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## Handout 4: American Bar Association - Confidentiality When Lawyer Represents Multiple Clients in the Same or Related Matters

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# AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

**Formal Opinion 08-450**

**April 9, 2008**

## **Confidentiality When Lawyer Represents Multiple Clients in the Same or Related Matters**

*Lawyers frequently are engaged to represent a client by a third party, most commonly an insurer or a relative. In some circumstances, the third party also may be a client of that lawyer, either with respect to the matter in question, or with respect to a related matter. When a lawyer represents multiple clients, either in the same or related matters, Model Rule 1.6 requires that the lawyer protect the confidentiality of information relating to each of his clients. Because the scope of the "implied authority" granted in Rule 1.6(a) to reveal confidential information "to carry out a representation" applies separately and exclusively to each representation the lawyer has undertaken, a conflict of interest arises when the lawyer recognizes the necessity of revealing confidential information relating to one client in order effectively to carry out the representation of another. In such a circumstance, the lawyer would be required to withdraw from representing one or both of her clients.<sup>1</sup>*

Among a lawyer's foremost professional responsibilities are fidelity to a client and preservation of the client's confidence with respect to "information related to the representation" as addressed by Rule 1.6.<sup>2</sup> On the other hand, a

1. This opinion is based on the Model Rules of Professional Conduct as amended by the ABA House of Delegates through February 8, 2008. The laws, court rules, regulations, rules of professional conduct and opinions promulgated in the individual jurisdictions are controlling. This opinion supersedes Informal Opinions 949, "Defense of Insured-Insurer, Conflict of Interest and Confidences of Client" (Aug. 8, 1966), in INFORMAL ETHICS OPINIONS, VOL. II 867-1284 (ABA 1975) at 948, and 1476, "Duty of Lawyer to Preserve Confidences and Secrets of Client in Multiple Representation from Co-clients," in FORMAL AND INFORMAL ETHICS OPINIONS, FORMAL OPINIONS 316-348, INFORMAL OPINIONS 1285-1495 (ABA 1985) at 402, which are hereby withdrawn.

2. Rule 1.6 states:

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

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lawyer is required by Rule 1.4(b) to provide information to a client “to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”<sup>3</sup> When a lawyer represents multiple clients in the same or related matters, the obligation of confidentiality to each sometimes may conflict with the obligation of disclosure to each.<sup>4</sup> There are a variety of common circumstances, in litigation and otherwise, where a lawyer either represents multiple clients or represents one client, but another person is compensating the lawyer for doing so.<sup>5</sup> Whether the latter situation involves an insurance company or a client’s relative engaging the lawyer, the boundaries of Rule 1.6 and of Rule 1.8(f)(3)<sup>6</sup> require the lawyer to exercise care with information relating to the representation. This opinion addresses the factors the Rules bring to bear to resolve that conflict.

The issues may usefully be considered in the context of a hypothetical, but

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- (1) to prevent reasonably certain death or substantial bodily harm;
  - (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer’s services;
  - (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client’s commission of a crime or fraud in furtherance of which the client has used the lawyer’s services;
  - (4) to secure legal advice about the lawyer’s compliance with these Rules;
  - (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer’s representation of the client; or
  - (6) to comply with other law or a court order.

3. The lawyer also is required by Rule 1.1 to provide competent representation to a client, which requires communicating information adequate to that purpose.

4. *See* Rule 1.7, cmt. 30 (“[w]ith respect to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach.”) The common complication is that, in such situations as insurance, even if both carrier and insured are deemed to be clients, the scope of representation relates only as to the indemnity matter, not as to any disputes between the carrier and insured. Whether or not the lawyer has an ethical duty of confidentiality is separate from the privilege question, which turns on the scope of the lawyer’s duty to each client.

5. In some states in the insurance context, the payor also is a client; in others, it is not a situation of multiple representations. *See infra* note 6 and accompanying text.

6. Rule 1.8(f) states:

A lawyer shall not accept compensation for representing a client from one other than the client unless:

- (1) the client gives informed consent;
- (2) there is no interference with the lawyer’s independence of professional judgment or with the client-lawyer relationship; and
- (3) information relating to the representation of a client is protected as required by Rule 1.6.

common, situation. A lawyer is retained by an insurance company to defend both an insured employer and an employee of the insured whose conduct is at issue and for which the employer may vicariously be liable. In the course of a conversation with the lawyer, the employee relates facts to the lawyer indicating that the employee may have acted outside the scope of his employment and that, under the terms of the insurance contract, the employee may not be entitled to the protection of the employer's insurance. The employee made the disclosures in the reasonable belief that he was doing so in a lawyer-client relationship, and without understanding the implications of the facts. The lawyer learned similar information when interviewing another witness. The lawyer believes that the insurance company may have a contractual right to deny protection to the employee based on these facts. It also is possible that the employer could invoke scope-of-employment principles to defend against its own liability to the plaintiff.

There are two points in time at which the potential problem of confidential information involving multiple clients must be addressed. The first point in time is when the joint representation is undertaken, when both the scope of the representation and the clients' intentions concerning the lawyer's duty with respect to confidentiality can best be clarified for each client. In certain jurisdictions, a lawyer engaged by an insurance carrier to defend an insured is deemed to represent both the insured and the insurer, and in other jurisdictions such a lawyer is deemed to represent only the insured.<sup>7</sup> Although the identity of the client may be relevant to questions of conflict of interest, resolving that issue under a given jurisdiction's principles is not necessary to determine the lawyer's duty with respect to the confidential information of the employee or employer in the situation described above. The same analysis applies whenever the lawyer is placed in the position of representing multiple clients, or of having duties under contracts such as an insurance policy to an indemnitor with rights affecting the lawyer's provision of a defense to a litigation client.

In the situation of insurer-engaged counsel, the scope of the representation normally is understood by the insurer to be limited to defending the action under the policy, and not to include representing the carrier or the insured in any coverage or other dispute between the two.<sup>8</sup> Insureds may not fully

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7. See ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 01-421, "Ethical Obligations of a Lawyer Working Under Insurance Company Guidelines and Other Restrictions" (Feb. 16, 2001), at 3 & nn. 6 & 7 (noting the split between "one client" [lawyer only represents insured] and "two client" [lawyer represents both insurer and insured] states). Although a lawyer might limit the scope of representation by contract (*e.g.*, by providing in the engagement letter that only the insured is represented), we have no evidence that this is being done.

8. Whether the lawyer may or must advise the insured of possible claims against the insurer turns on the scope of the representation, on the lawyer's duties to the insurer under substantive law, and on the extent to which a conflict of interest precludes such advice. To the greatest extent possible, ambiguity about such issues should be clarified by the lawyer at the onset of the representation.

understand those limitations,<sup>9</sup> so counsel retained by an insurer or other third party should ensure that the client(s) are fully informed at the inception of the relationship, preferably in writing, of any limitation inherent in the representation and any area of potential conflict. To the extent the clients' informed consent to any conflicts of interest may be required under Rules 1.7 through 1.9, both clients' expectations related to confidentiality need to be addressed in order for the waiver to be valid. An advance waiver from the carrier or employer, permitting the lawyer to continue representing the insured in the event conflicts arise, may well be appropriate.<sup>10</sup>

The second point in time at which the lawyer's duty concerning confidential information must be addressed is when the lawyer comes to understand that disclosure to one client will be harmful to the other client's interest. In our example, the insured may not understand the reasons the information may defeat coverage, but the lawyer knows. Resolving what the lawyer should do requires balancing the lawyer's obligations under Rules 1.6 and 1.4(b).<sup>11</sup>

Absent an express agreement among the lawyer and the clients that satisfies the "informed consent" standard of Rule 1.6(a), the Committee believes that whenever information related to the representation of a client may be harmful to the client in the hands of another client or a third person,<sup>12</sup> the lawyer is prohibited by Rule 1.6 from revealing that information to any person, including the other client and the third person, unless disclosure is permitted under an exception to Rule 1.6. Whether any agreement made before

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9. Many lay persons may think of a lawyer engaged to represent them as "their lawyer," without qualification. *Cf.* Rule 1.2(c), cmt. 6 (when a lawyer has been retained by an insurer to represent an insured "the representation may be limited to matters related to the insurance coverage.") Rule 1.2(c) requires "informed consent" by the insured to such a limitation.

10. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 05-436 (May 11, 2005) (discussing advance waivers in the context of conflicts of interest). As discussed in that opinion, waiver of future conflicts is generally more feasible when dealing with experienced users of legal services, a principle that would apply equally to a waiver of the duty of communication under Rule 1.4.

11. *See* *A. v. B.*, 726 A.2d 924, 927 (N.J. 1999) (resolving tension between 1.6 and 1.4 in favor of disclosure of fraud under New Jersey version of 1.6 permitting disclosure reasonably necessary to "rectify the ... client's ... fraudulent act in furtherance of which the lawyer's services had been used," contrary to New York and Florida opinions that would prohibit disclosure). Since 1999, Rule 1.6 has been amended substantially to include the New Jersey language.

12. The extent to which harm is relevant relates to when the lawyer is impliedly authorized to disclose. In practice, lawyers routinely disclose information that would otherwise be confidential without obtaining express prior waivers from every client on every piece of information related to a matter, because the information at issue must be disclosed in order to represent the client. This circumstance, addressed in the provision of Rule 1.6(a) on implied authority, does not usually apply when "adverse" to the client. *See* Rule 1.6(b), Comments [6]-[15].

the lawyer understands the facts giving rise to the conflict may satisfy “informed consent” (which presumes appreciation of “adequate information” about those facts) is highly doubtful. In the event the lawyer is prohibited from revealing the information, and withholding the information from the other client would cause the lawyer to violate Rule 1.4(b), the lawyer must withdraw from representing the other client under Rule 1.16(a)(1).

The confidentiality issues are governed by Rule 1.6, which provides three circumstances under which “information related to the representation” may be revealed: informed consent, implied authority, or an applicable exception. Under the circumstances detailed above, both the information given to the lawyer by the client and the information gleaned from the witness constitutes “information related to the representation.”<sup>13</sup> Rule 1.6 applies not only to information protected by the attorney-client or work product privileges, but to non-privileged information as well.<sup>14</sup>

The lawyer may not reveal the information gained by the lawyer from either the employee or the witness, or use it to the benefit of the insurance company,<sup>15</sup> when the revelation might result in denial of insurance protection to the employee.<sup>16</sup> Under the circumstances described in the hypothetical, there has been no “informed consent” and it would be difficult to envision either that a lawyer could recommend or that the client would freely authorize disclosure once given an “explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.” None of the exceptions of Rule 1.6(b) apply. The only question, therefore, is whether anything about the multiple representation warrants a conclusion that the

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13. The term “information related to the representation” is not defined in the Rules, although Comment [3] makes clear that it is intentionally broad, encompassing not only information protected by the attorney-client and work product privileges, but “all information relating to the representation, whatever its source.”

14. Whether the communication to the lawyer by the insured’s employee is privileged is a question of law, which the Committee ordinarily does not consider. The Committee notes, however, that where a lawyer represents multiple clients in a matter (such as the insured employer, its employee, and the insurance company), communications by any client to the lawyer may not be privileged as to the other clients. *See, e.g., Moritz v. Medical Protective Co.*, 428 F. Supp. 865 (W.D. Wis. 1977); *Henke v. Iowa Home Mutual Casualty Co.*, 249 Iowa 614, 87 N.W.2d 920 (1958). The privilege question, however, does not resolve the question of the lawyer’s duty under Rule 1.6.

15. *See* Rule 1.8(b) (lawyer may not use information related to the representation “to the disadvantage of the client” absent informed consent or a specific Rule exception).

16. *See Perez v. Kirk & Carrigan*, 822 S.W.2d 261, 265-66 (Tex. App. 1991) (scope of ethical duty may exceed attorney-client privilege in multiple client situations; where confidentiality is expressly assured in multiple representations, lawyer has fiduciary duty of confidentiality). The confidentiality duty assumes the employee-client has not made false or fraudulent statements, and is not engaging in a crime that the lawyer may have a duty to reveal to the affected person. *See* Rules 1.6(b)(1), 3.3(b).

lawyer has impliedly been authorized to make the disclosure.

Implied authority applies only when the lawyer reasonably perceives that disclosure is necessary to the representation of the client whose information is protected by Rule 1.6. Comment [5] to Rule 1.6 provides that “a lawyer may be impliedly authorized ... to make a disclosure that facilitates a satisfactory conclusion to a matter.”<sup>17</sup> Disclosures adverse to the client are carefully detailed in the exceptions under Rule 1.6(b), and no client may be presumed impliedly to have authorized such disclosures. In our hypothetical, therefore, there is no basis upon which the lawyer could conclude that disclosure of information that would deprive the employee of coverage is necessary to the representation of the employee, so there is no implied authority justifying disclosure of the information to the insurance company, to the employer, or to any other person.

Lawyers routinely have multiple clients with unrelated matters, and may not share the information of one client with other clients. The difference when the lawyer represents multiple clients on the same or a related matter is that the lawyer has a duty to communicate with all of the clients about that matter. Each client is entitled to the benefit of Rule 1.6 with respect to information relating to that client’s representation, and a lawyer whose representation of multiple clients is not prohibited by Rule 1.7 is bound to protect the information of each client from disclosure, whether to other clients or otherwise.

The question generally will be whether withholding the information from the other client would violate the lawyer’s duty under Rule 1.4(b) to “explain a matter to the extent reasonably necessary to permit the [other] client to make informed decisions regarding the representation.” If so, the interests of the two clients would be directly adverse, requiring the lawyer’s withdrawal under Rule 1.16(a)(1) because the lawyer’s continued representation of both would result in a violation of Rule 1.7. The answer depends on whether the scope of the lawyer’s representation requires disclosure to the other client.<sup>18</sup> Ordinarily, when a lawyer is engaged by an insurer to represent the insured, the substantive law precludes the lawyer from acting contrary to the interests of the insured.<sup>19</sup> In that situation, the lawyer has no obligation under Rule 1.4

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17. *Cf. Parler & Wobber v. Miles & Stockbridge*, 756 A.2d 526, 541, 545-46 (Md. 2000), citing *Hearn v. Rhay*, 68 F.R.D. 574 (E.D. Wa. 1975) (test for implied waiver of attorney-client privilege is affirmative act by asserting party to put information at issue in a lawsuit that would be vital to the adversary’s position in the matter).

18. Although the problem commonly involves potential disclosures to an insurer that could impair the insured’s interests, it could involve potential disclosures to an insured impairing the insurer’s interests, particularly in “two client” states. *Cf. Paradigm Ins. Co. v. Langerman Law Offices, P.A.*, 24 P.3d 593, 600-01 (Ariz. 2001) (insurer-engaged counsel may owe duty of care to insurer even absent attorney-client relationship).

19. In “one client” states this rule flows from the notion that the lawyer represents only the insured, and in “two client” states the rule may be articulated in terms of a “primary” duty to the insured. *See, e.g., Nevada Yellow Cab Corp. v. Eighth Jud.*

to communicate to the insurer information contrary to the interests of the insured, but on the contrary, is obliged by Rule 1.6 not to do so.

We are mindful that a typical liability insurance policy does not give the insured the right to choose the lawyer retained and compensated by the insurance company. Moreover, the insured is required, as a condition of the insurance protection, to cooperate and assist in the defense and, implicitly, to reveal to the lawyer all pertinent information known to the insured. None of that, however, undermines the insured's right to expect that the lawyer will abide by Rule 1.6 and withhold from the carrier information relating to the representation that is damaging to the insured's interests under the policy.

The employer in our hypothetical is also the lawyer's client, and the employer's liability to the plaintiff may be affected by scope-of-employment circumstances. The lawyer would be unable under Rule 1.7 to pursue the employer's interest in avoiding legal responsibility for the employee's conduct if doing so could harm the interest of the employee-client in preserving insurance protection. Possibly, the employer-client and the insurance company would be willing to forego a scope-of-employment defense and stand with the employee, in which case the interests of the lawyer's clients would not differ. The lawyer's dilemma, however, is that in seeking this consent, the lawyer might disclose information the lawyer must preserve in confidence. She may not do so without the employee's informed consent, after full advice as to possible consequences.

It also may not be possible for a lawyer to recommend disclosure without committing malpractice, but that issue is beyond the scope of this opinion. When the lawyer represents the insurer or employer as well as the insured, and the interests of any of the three differ as to the advisability of waiver, Rule 1.16(a) will require withdrawal from representing the conflicting interest(s) that compromise the independent professional judgment to which the client is entitled under Rules 1.7 through 1.9. As noted in Comment [4] to Rule 1.7, when "a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation, unless the lawyer has obtained the informed consent of the client under the conditions of para-

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Dist. Court, 152 P.3d 737, 741 (Nev. 2007) ("primary client" remains insured in "majority" of jurisdictions); *American Home Assur. Co. v. Unauthorized Practice of Law Comm.*, 121 S.W.3d 831, 838 (Tex. App. 2003), judgment affirmed and modified, 2008 WL 821034 (Mar. 28, 2008) (ethical choices must be resolved in favor of insured as "primary client"). Particularly in a jurisdiction where the insured is considered the "primary" client in the "tripartite" relationship, an advance understanding could be routine that, if conflict arises, the lawyer may continue representing the insured. In some "two client" states, on the other hand, the insurer may be required by law when a conflict arises to provide independent counsel to the insured at the insurer's expense. *See, e.g., San Diego Fed. Credit Union v. Cumis Ins. Soc'y*, 162 Cal. App. 3d 358, 369-74, 208 Cal. Rptr. 494, 501-05 (Cal. App. 1984); *see also* CAL. CIV. CODE § 2860 (West Supp. 1992) (codifying, with modifications, the *Cumis* rule).



graph (b)” and “[w]here more than one client is involved, whether the lawyer may continue to represent any of the clients is determined both by the lawyer’s ability to comply with duties owed to the former client and by the lawyer’s ability to represent adequately the remaining client or clients, given the lawyer’s duties to the former client.”

Whether withdrawal from representing all the parties is required is governed by Rule 1.16(a), under which the lawyer’s obligation to withdraw is evaluated separately with respect to each client.<sup>20</sup> If the continued representation of any client would cause the lawyer to violate a Rule, including participation in any fraud, withdrawal from that representation will be required. The lawyer may be able to continue representing the insured, the “primary” client in most jurisdictions, depending in part on whether that topic has been clarified in advance.<sup>21</sup> If the lawyer cannot continue to represent the insured, she should recommend to the insurance company that separate counsel be retained to represent the insured’s interest only.

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20. See generally *Parsons v. Continental Nat’l Am. Gp.*, 550 P.2d 94, 98 (Ariz. 1976) (retained counsel “should have notified [the carrier] that he could no longer represent them when he obtained any information (as a result of his attorney-client relationship with [the insured]) that could possibly be detrimental to [the insured’s] interests under the coverage,” holding that when attorney gave such information to the carrier, the carrier was estopped to use it); see also *Brennan’s, Inc. v. Brennan’s Restaurants, Inc.*, 590 F.2d 168, 172 (5th Cir. 1979) (requiring lawyer who represented both clients to withdraw from representing either under pre-Model Rules “appearance of professional impropriety” principle).

21. See Rule 1.7 cmt. 31 (“[t]he lawyer should, at the outset of the common representation . . . , advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other.”) Clarifying expectations at the onset of the representation is always preferable in these situations, and may affect the ability of the lawyer to continue representing one or the other client after difficulties arise.

# AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 06-439

April 12, 2006

**Lawyer's Obligation of Truthfulness  
When Representing a Client in Negotiation:  
Application to Caucused Mediation**

*Under Model Rule 4.1, in the context of a negotiation, including a caucused mediation, a lawyer representing a client may not make a false statement of material fact to a third person. However, statements regarding a party's negotiating goals or its willingness to compromise, as well as statements that can fairly be characterized as negotiation "puffing," ordinarily are not considered "false statements of material fact" within the meaning of the Model Rules<sup>1</sup>.*

In this opinion, we discuss the obligation of a lawyer to be truthful when making statements on behalf of clients in negotiations, including the specialized form of negotiation known as caucused mediation.

It is not unusual in a negotiation for a party, directly or through counsel, to make a statement in the course of communicating its position that is less than entirely forthcoming. For example, parties to a settlement negotiation often understate their willingness to make concessions to resolve the dispute. A plaintiff might insist that it will not agree to resolve a dispute for less than \$200, when, in reality, it is willing to accept as little as \$150 to put an end to the matter. Similarly, a defendant manufacturer in patent infringement litigation might repeatedly reject the plaintiff's demand that a license be part of any settlement agreement, when in reality, the manufacturer has no genuine interest in the patented product and, once a new patent is issued, intends to introduce a new product that will render the old one obsolete. In the criminal law context, a prosecutor might not reveal an ultimate willingness to grant immunity as part of a cooperation agreement in order to retain influence over the witness.

A party in a negotiation also might exaggerate or emphasize the strengths, and minimize or deemphasize the weaknesses, of its factual or legal position. A buyer of products or services, for example, might overstate its confidence in the availability of alternate sources of supply to reduce the appearance of

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1. This opinion is based on the Model Rules of Professional Conduct as amended by the ABA House of Delegates in August 2003 and, to the extent indicated, the predecessor Model Code of Professional Responsibility of the American Bar Association. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in the individual jurisdictions are controlling.

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dependence upon the supplier with which it is negotiating. Such remarks, often characterized as “posturing” or “puffing,” are statements upon which parties to a negotiation ordinarily would not be expected justifiably to rely, and must be distinguished from false statements of material fact. An example of a false statement of material fact would be a lawyer representing an employer in labor negotiations stating to union lawyers that adding a particular employee benefit will cost the company an additional \$100 per employee, when the lawyer knows that it actually will cost only \$20 per employee. Similarly, it cannot be considered “posturing” for a lawyer representing a defendant to declare that documentary evidence will be submitted at trial in support of a defense when the lawyer knows that such documents do not exist or will be inadmissible. In the same vein, neither a prosecutor nor a criminal defense lawyer can tell the other party during a plea negotiation that they are aware of an eyewitness to the alleged crime when that is not the case.

### **Applicable Provision of the Model Rules**

The issues addressed herein are governed by Rule 4.1(a).<sup>2</sup> That rule prohibits a lawyer, “[i]n the course of representing a client,” from knowingly making “a false statement of material fact or law to a third person.” As to what constitutes a “statement of fact,” Comment [2] to Rule 4.1 provides additional explanation:

2. Although Model Rule 3.3 also prohibits lawyers from knowingly making untrue statements of fact, it is not applicable in the context of a mediation or a negotiation among parties. Rule 3.3 applies only to statements made to a “tribunal.” It does not apply in mediation because a mediator is not a “tribunal” as defined in Model Rule 1.0(m). Comment [5] to Model Rule 2.4 confirms the inapplicability of Rule 3.3 to mediation:

Lawyers who represent clients in alternative dispute-resolution processes are governed by the Rules of Professional Conduct. When the dispute-resolution process takes place before a tribunal, as in binding arbitration (see Rule 1.0(m)), the lawyer’s duty of candor is governed by Rule 3.3. Otherwise, the lawyer’s duty of candor toward both the third-party neutral and other parties is governed by Rule 4.1.

Rule 3.3 does apply, however, to statements made to a tribunal when the tribunal itself is participating in settlement negotiations, including court-sponsored mediation in which a judge participates. *See* ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 93-370 (1993) (Judicial Participation in Pretrial Settlement Negotiations), in *FORMAL AND INFORMAL ETHICS OPINIONS 1983-1998* at 157, 161 (ABA 2000).

Rule 8.4(c), which on its face broadly proscribes “conduct involving dishonesty, fraud, deceit or misrepresentation,” does not require a greater degree of truthfulness on the part of lawyers representing parties to a negotiation than does Rule 4.1. Comment [1] to Rule 4.1, for example, describes Rule 8.4 as prohibiting “misrepresentations by a lawyer other than in the course of representing a client . . . .” In addition, Comment [5] to Rule 2.4 explains that the duty of candor of “lawyers who represent clients in alternative dispute resolution processes” is governed by Rule 3.3 when the process takes place before a tribunal, and otherwise by Rule 4.1. Tellingly, no reference is made in that Comment to Rule 8.4. Indeed, if Rule 8.4 were interpreted literally as applying to any misrepresentation, regardless of the lawyer’s state of mind or the triviality of the false statement in question, it would render Rule 4.1 superfluous, including by punishing unknowing or immaterial deceptions that would not even run afoul of Rule 4.1. *See* GEOFFREY C. HAZARD, JR. & W. WILLIAM

This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.<sup>3</sup>

### Truthfulness in Negotiation

It has been suggested by some commentators that lawyers must act honestly and in good faith and should not accept results that are unconscionably unfair, even when they would be to the advantage of the lawyer's own client.<sup>4</sup> Others have embraced the position that deception is inherent in the negotiation process and that a zealous advocate should take advantage of every opportunity to advance the cause of the client through such tactics within the bounds of the law.<sup>5</sup> Still others have suggested that lawyers should strive to balance the

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HODES, *THE LAW OF LAWYERING* § 65.5 at 65-11 (3d ed. 2001). It is not necessary, however, for this Committee to delineate the precise outer boundaries of Rule 8.4(c) in the context of this opinion. Suffice it to say that, whatever the reach of Rule 8.4(c) may be, the Rule does not prohibit conduct that is permitted by Rule 4.1(a).

3. The RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 98, cmt. c (2000) (hereinafter "RESTATEMENT") (citations omitted) echoes the principles underlying Comment [2] to Rule 4.1:

Certain statements, such as some statements relating to price or value, are considered nonactionable hyperbole or a reflection of the state of mind of the speaker and not misstatements of fact or law. Whether a statement should be so characterized depends on whether the person to whom the statement is addressed would reasonably regard the statement as one of fact or based on the speaker's knowledge of facts reasonably implied by the statement, or instead regard it as merely an expression of the speaker's state of mind.

4. See, e.g., Reed Elizabeth Loder, "Moral Truthseeking and the Virtuous Negotiator," 8 *Geo. J. Legal Ethics* 45, 93-102 (1994) (principles of morality should drive legal profession toward rejection of concept that negotiation is inherently and appropriately deceptive); Alvin B. Rubin, "A Causerie on Lawyers' Ethics in Negotiation," 35 *La. L. Rev.* 577, 589, 591 (1975) (lawyer must act honestly and in good faith and may not accept a result that is unconscionably unfair to other party); Michael H. Rubin, "The Ethics of Negotiation: Are There Any?," 56 *La. L. Rev.* 447, 448 (1995) (embracing approach that ethical basis of negotiations should be truth and fair dealing, with goal being to avoid results that are unconscionably unfair to other party).

5. See, e.g., Barry R. Temkin, "Misrepresentation by Omission in Settlement Negotiations: Should There Be a Silent Safe Harbor?," 18 *Geo. J. Legal Ethics* 179, 181 (2004) (clients are entitled to expect their lawyers to be zealous advocates; current literature bemoaning lack of honesty and truthfulness in negotiation has gone too far); James J. White, "Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation," 1980 *Am. B. Found. Res. J.* 921, 928 (1980) (misleading other side is essence of negotiation and is all part of the game).

apparent need to be less than wholly forthcoming in negotiation against the desirability of adhering to personal ethical and moral standards.<sup>6</sup> Rule 4.1(a) applies only to statements of material fact that the lawyer knows to be false, and thus does not cover false statements that are made unknowingly, that concern immaterial matters, or that relate to neither fact nor law. Various proposals also have been advanced to change the applicable ethics rules, either by amending Rule 4.1 and its Comments, or by extending Rule 3.3 to negotiation, or by creating a parallel set of ethics rules for negotiating lawyers.<sup>7</sup>

Although this Committee has not addressed the precise question posed herein, we previously have opined on issues relating to lawyer candor in negotiations. For example, we stated in Formal Opinion 93-370<sup>8</sup> that, although a lawyer may in some circumstances ethically decline to answer a judge's questions concerning the limits of the lawyer's settlement authority in a civil matter,<sup>9</sup> the lawyer is not justified in lying or engaging in misrepresentations in response to such an inquiry. We observed that:

[w]hile . . . a certain amount of posturing or puffery in settlement negotiations may be an acceptable convention between opposing counsel, a party's actual bottom line or the settlement authority given to a lawyer is a material fact. A deliberate misrepresentation or lie to a judge in pretrial negotiations would be improper under Rule 4.1. Model Rule 8.4(c) also prohibits a lawyer from engaging in conduct involving dishonesty,

6. See, e.g., Charles B. Craver, "Negotiation Ethics: How to Be Deceptive Without Being Dishonest/How to Be Assertive Without Being Offensive," 38 *S. Tex. L. Rev.* 713, 733-34 (1997) (lawyers should balance their clients' interests with their personal integrity); Van M. Pounds, "Promoting Truthfulness in Negotiation: A Mindful Approach," 40 *Willamette L. Rev.* 181, 183 (2004) (suggesting that solution to finding more truthful course in negotiation may lie in ancient Buddhist practice of "mindfulness," of "waking up and living in harmony with oneself and with the world").

7. See, e.g., James J. Alfani, "Settlement Ethics and Lawyering in ADR Proceedings: A Proposal to Revise Rule 4.1," 19 *N. Ill. U. L. Rev.* 255, 269-72 (1999) (author would amend Rule 4.1 to prohibit lawyers from knowingly assisting the client in "reaching a settlement agreement that is based on reliance upon a false statement of fact made by the lawyer's client" and would expressly apply Rule 3.3 to mediation); Kimberlee K. Kovach, "New Wine Requires New Wineskins: Transforming Lawyer Ethics for Effective Representation in a Non-Adversarial Approach to Problem Solving: Mediation," 28 *Fordham Urb. L. J.* 935, 953-59 (2001) (urging adoption of separate code of ethics for lawyers engaged in mediation and other non-adversarial forms of ADR); Carrie Menkel-Meadow, "The Lawyer as Consensus Builder: Ethics for a New Practice," 70 *Tenn. L. Rev.* 63, 67-87, (2002) (encouraging Ethics 2000 Commission to develop rules for lawyers in alternative dispute resolution context).

8. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-370, in *FORMAL AND INFORMAL ETHICS OPINIONS 1983-1998* at 160-61.

9. The opinion also concluded that it would be improper for a judge to insist that a lawyer "disclose settlement limits authorized by the lawyer's client, or the lawyer's advice to the client regarding settlement terms."

fraud, deceit, or misrepresentation, and Rule 3.3 provides that a lawyer shall not knowingly make a false statement of material fact or law to a tribunal. The proper response by a lawyer to improper questions from a judge is to decline to answer, not to lie or misrepresent.

Similarly, in Formal Opinion 94-387,<sup>10</sup> we expressed the view that a lawyer representing a claimant in a negotiation has no obligation to inform the other party that the statute of limitations has run on the client's claim, but cannot make any affirmative misrepresentations about the facts. In contrast, we stated in Formal Opinion 95-397<sup>11</sup> that a lawyer engaged in settlement negotiations of a pending personal injury lawsuit in which the client was the plaintiff cannot conceal the client's death, and must promptly notify opposing counsel and the court of that fact. Underlying this conclusion was the concept that the death of the client was a material fact, and that any continued communication with opposing counsel or the court would constitute an implicit misrepresentation that the client still was alive. Such a misrepresentation would be prohibited under Rule 4.1 and, with respect to the court, Rule 3.3. Opinions of the few state and local ethics committees that have addressed these issues are to the same effect.<sup>12</sup>

False statements of material fact by lawyers in negotiation, as well as implicit misrepresentations created by a lawyer's failure to make truthful statements, have in some cases also led to professional discipline. For example, in reliance on Formal Opinion 95-397, a Kentucky lawyer was disciplined under Rule 4.1 for settling a personal injury case without disclosing that her client had died.<sup>13</sup> Similarly, in a situation raising issues like those presented in Formal Opinion 93-370, a New York lawyer was disciplined for

10. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 94-387 (1994) (Disclosure to Opposing Party and Court that Statute of Limitations Has Run), in *FORMAL AND INFORMAL ETHICS OPINIONS 1983-1998* at 253.

11. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 95-397 (1995) (Duty to Disclose Death of Client), in *FORMAL AND INFORMAL ETHICS OPINIONS 1983-1988* at 362.

12. *See* New York County Lawyers' Ass'n Committee on Prof'l Ethics Op. 731 (Sept. 1, 2003) (lawyer not obligated to reveal existence of insurance coverage during a negotiation unless disclosure is required by law; correlatively, not required to correct misapprehensions of other party attributable to outside sources regarding the client's financial resources); Pennsylvania Bar Ass'n Comm. on Legal Ethics & Prof'l Responsibility Informal Op. 97-44 (Apr. 23, 1997) (lawyer negotiating on behalf of a client who is an undisclosed principal is not obligated to disclose the client's identity to the other party, or to disclose the fact that that other party is negotiating with a straw man); Rhode Island Supreme Court Ethics Advisory Panel Op. 94-40 (July 27, 1994) (lawyer may continue negotiations even though recent developments in Rhode Island case law may bar client's claim).

13. *Kentucky Bar Ass'n v. Geisler*, 938 S.W.2d 578, 579-80 (Ky. 1997); *see also* *In re Warner*, 851 So. 2d 1029, 1037 (La.), reh'g denied (Sept. 5, 2003) (lawyer disciplined for failure to disclose death of client prior to settlement of personal injury action); *Toldeo Bar Ass'n v. Fell*, 364 N.E.2d 872, 874 (1977) (same).

stating to opposing counsel that, to the best of his knowledge, his client's insurance coverage was limited to \$200,000, when documents in his files showed that the client had \$1,000,000 in coverage.<sup>14</sup> Affirmative misrepresentations by lawyers in negotiation also have been the basis for the imposition of litigation sanctions,<sup>15</sup> and the setting aside of settlement agreements,<sup>16</sup> as well as civil lawsuits against the lawyers themselves.<sup>17</sup>

In contrast, statements regarding negotiating goals or willingness to compromise, whether in the civil or criminal context, ordinarily are not considered statements of material fact within the meaning of the Rules. Thus, a lawyer may downplay a client's willingness to compromise, or present a client's bargaining position without disclosing the client's "bottom line" position, in an effort to reach a more favorable resolution. Of the same nature are overstatements or understatement of the strengths or weaknesses of a client's position in litigation or otherwise, or expressions of opinion as to the value or worth of the subject matter of the negotiation. Such statements generally are not considered material facts subject to Rule 4.1.<sup>18</sup>

#### **Application of the Governing Principles to Caucused Mediation**

Having delineated the requisite standard of truthfulness for a lawyer engaged in the negotiation process, we proceed to consider whether a different standard should apply to a lawyer representing a client in a caucused mediation.<sup>19</sup>

14. *In re McGrath*, 468 N.Y.S.2d 349, 351 (N.Y. App. Div. 1983).

15. *See Sheppard v. River Valley Fitness One, L.P.*, 428 F.3d 1, 11 (1st Cir. 2005); *Ausherman v. Bank of America Corp.*, 212 F. Supp. 2d 435, 443-45 (D. Md. 2002).

16. *See, e.g., Virzi v. Grand Trunk Warehouse & Cold Storage Co.*, 571 F. Supp. 507, 512 (E.D. Mich. 1983) (settlement agreement set aside because of lawyer's failure to disclose death of client prior to settlement); *Spaulding v. Zimmerman*, 116 N.W.2d 704, 709-11 (Minn. 1962) (defense counsel's failure to disclose material adverse facts relating to plaintiff's medical condition led to vacatur of settlement agreement).

17. *See, e.g., Hansen v. Anderson, Wilmarth & Van Der Maaten*, 630 N.W.2d 818, 825-27 (Iowa 2001) (law firm, defendant in malpractice action, allowed to assert third-party claim for equitable indemnity directly against opposing counsel who had engaged in misrepresentations during negotiations); *Jeska v. Mulhall*, 693 P.2d 1335, 1338-39 (1985) (sustaining fraudulent misrepresentation claim by buyer of real estate against seller's lawyer for misrepresentations made during negotiations).

18. Conceivably, such statements could be viewed as violative of other provisions of the Model Rules if made in bad faith and without any intention to seek a compromise. Model Rule 4.4(a), for example, prohibits lawyers from using "means that have no substantial purpose other than to embarrass, delay, or burden a third person . . . ." Similarly, Model Rule 3.2 requires lawyers to "make reasonable efforts to expedite litigation consistent with the interests of the client."

19. This opinion is limited to lawyers representing clients involved in caucused mediation, and does not attempt to explore issues that may be presented when a lawyer serves as a mediator and, in carrying out that role, makes a false or misleading statement of fact. A lawyer serving as a mediator is not representing a client, and is thus not subject to Rule 4.1, but may well be subject to Rule 8.4(c) (*see note 2 above*). *Cf. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 04-433* (2004)

Mediation is a consensual process in which a neutral third party, without any power to impose a resolution, works with the disputants to help them reach agreement as to some or all of the issues in controversy. Mediators assist the parties by attempting to fashion creative and integrative solutions to their problems. In the most basic form of mediation, a neutral individual meets with all of the parties simultaneously and attempts to moderate and direct their discussions and negotiations. Whatever is communicated to the mediator by a party or its counsel is heard by all other participants in the mediation. In contrast, the mediator in a caucused mediation meets privately with the parties, either individually or in aligned groups. These caucuses are confidential, and the flow of information among the parties and their counsel is controlled by the mediator subject to the agreement of the respective parties.

It has been argued that lawyers involved in caucused mediation should be held to a more exacting standard of truthfulness because a neutral is involved. The theory underlying this position is that, as in a game of “telephone,” the accuracy of communication deteriorates on successive transmissions between individuals, and those distortions tend to become magnified on continued retransmission. Mediators, in turn, may from time to time reframe information as part of their efforts to achieve a resolution of the dispute. To address this phenomenon, which has been called “deception synergy,” proponents of this view suggest that greater accuracy is required in statements made by the parties and their counsel in a caucused mediation than is required in face-to-face negotiations.<sup>20</sup>

It has also been asserted that, to the contrary, less attention need be paid to the accuracy of information being communicated in a mediation – particularly in a caucused mediation – precisely because consensual deception is intrinsic to the process. Information is imparted in confidence to the mediator, who controls the flow of information between the parties in terms of the content of the communications as well as how and when in the process it is conveyed. Supporters of this view argue that this dynamic creates a constant and agreed-upon environment of imperfect information that ultimately helps the mediator assist the parties in resolving their disputes.<sup>21</sup>

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(Obligation of a Lawyer to Report Professional Misconduct by a Lawyer Not Engaged in the Practice of Law). In our view, Rule 8.4(c) should not impose a more demanding standard of truthfulness for a lawyer when acting as a mediator than when representing a client. We note, in this regard, that many mediators are nonlawyers who are not subject to lawyer ethics rules. We need not address whether a lawyer should be held to a different standard of behavior than other persons serving as mediator.

20. See generally John W. Cooley, “Mediation Magic: Its Use and Abuse,” 29 *Loy. U. Chi. L.J.* 1, 101 (1997); see also Jeffrey Krivis, “The Truth About Using Deception in Mediation,” 20 *Alternatives to High Cost Litig.* 121 (2002).

21. Mediators are “the conductors – the orchestrators – of an information system specially designed for each dispute, a system with ambiguously defined or, in some situations undefined, disclosure rules in which mediators are the chief information officers with near-absolute control. Mediators’ control extends to what nonconfidential informa-



Whatever the validity may be of these competing viewpoints, the ethical principles governing lawyer truthfulness do not permit a distinction to be drawn between the caucused mediation context and other negotiation settings. The Model Rules do not require a higher standard of truthfulness in any particular negotiation contexts. Except for Rule 3.3, which is applicable only to statements before a “tribunal,” the ethical prohibitions against lawyer misrepresentations apply equally in all environments. Nor is a lower standard of truthfulness warranted because of the consensual nature of mediation. Parties otherwise protected against lawyer misrepresentation by Rule 4.1 are not permitted to waive that protection, whether explicitly through informed consent, or implicitly by agreeing to engage in a process in which it is somehow “understood” that false statements will be made. Thus, the same standards that apply to lawyers engaged in negotiations must apply to them in the context of caucused mediation.<sup>22</sup>

We emphasize that, whether in a direct negotiation or in a caucused mediation, care must be taken by the lawyer to ensure that communications regarding the client’s position, which otherwise would not be considered statements “of fact,” are not conveyed in language that converts them, even inadvertently, into false factual representations. For example, even though a client’s Board of Directors has authorized a higher settlement figure, a lawyer may state in a negotiation that the client does not wish to settle for more than \$50. However, it would not be permissible for the lawyer to state that the Board of Directors had formally disapproved any settlement in excess of \$50, when authority had in fact been granted to settle for a higher sum.

### Conclusion

Under Model Rule 4.1, in the context of a negotiation, including a caucused mediation, a lawyer representing a party may not make a false statement of material fact to a third person. However, statements regarding a party’s negotiating goals or its willingness to compromise, as well as statements that can fairly be characterized as negotiation “puffing,” are ordinarily not considered “false statements of material fact” within the meaning of the Model Rules.

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tion, critical or otherwise, is developed, to what is withheld, to what is disclosed, and to when disclosure occurs.” Cooley, *supra* note 20, at 6 (citing Christopher W. Moore, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT* 35-43 (1986)).

22. There may nevertheless be circumstances in which a greater degree of truthfulness may be required in the context of a caucused mediation in order to effectuate the goals of the client. For example, complete candor may be necessary to gain the mediator’s trust or to provide the mediator with critical information regarding the client’s goals or intentions so that the mediator can effectively assist the parties in forging an agreement. As one scholar has suggested, mediation, “perhaps even more than litigation, relies on candid statements of the parties regarding their needs, interests, and objectives.” Menkel-Meadow, *supra* note 7, at 95. Thus, in extreme cases, a failure to be forthcoming, even though not in contravention of Rule 4.1(a), could constitute a violation of the lawyer’s duty to provide competent representation under Model Rule 1.1.

# AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 95-396

July 28, 1995

## Communications with Represented Persons

*Rule 4.2 prohibits a lawyer from knowingly communicating with a represented person about the subject matter of the representation without the consent of that person's lawyer. This prohibition applies to the conduct of lawyers in both civil and criminal matters, and covers any person known to be represented by a lawyer with respect to the matter to be discussed.*

In the context of criminal investigations, nonetheless, it must be recognized that the Rule has been interpreted by some courts not to prohibit contacts by investigative agents acting under the general direction of a lawyer, with a person known to be represented in the matter being investigated, prior to arrest or the institution of formal charges.

The communicating lawyer is not barred from communicating with the represented person absent actual knowledge of the representation. Such knowledge may, however, be inferred from the circumstances; thus, a lawyer may not avoid the need to secure consent of counsel by closing her eyes to circumstances that make it obvious that the person to be communicated with is represented with respect to the matter in question.

The communicating lawyer is not barred from communicating with a represented person about topics that are not the subject of the representation.

When a corporation or other organization is known to be represented with respect to a particular matter, the bar applies only to communications with those employees who have managerial responsibility, those whose act or omission may be imputed to the organization, and those whose statements may constitute admissions by the organization with respect to the matter in question. Thus, a lawyer representing the organization cannot insulate all employees from contacts with opposing lawyers by asserting a blanket representation of the organization.

The fact that the represented person is the one who initiates a communication does not render inapplicable the prohibition on communicating about the subject matter of the representation.

When a person known to have been represented initiates contact with a lawyer and declares that she has terminated or intends to terminate the representation, the lawyer should obtain reasonable assurance that the representation has in fact been terminated before engaging in substantive discussion of

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the subject of the representation.

A lawyer may not direct an investigative agent to communicate with a represented person in circumstances where the lawyer herself would be prohibited from doing so. Whether in a civil or a criminal matter, if the investigator acts as the lawyer's "alter ego," the lawyer is ethically responsible for the investigator's conduct.

The bar against contacts with represented persons applies to all communications relating to the subject matter of the representation except those that fall within the narrow category of being "authorized by law." Communications "authorized by law" include communications that are constitutionally protected, and in addition, communications that are specifically authorized by statute, court rule, court order, statutorily authorized regulation or judicial decisional precedent.

Recent controversy concerning Rule 4.2 of the Model Rules of Professional Conduct (1983, as amended) has prompted this Committee to undertake a comprehensive consideration of the proper scope of the Rule.<sup>1</sup> The Rule as it now stands provides:

**Communication with Person Represented by Counsel**

In representing a client, a lawyer shall not communicate about the subject matter of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.<sup>2</sup>

The questions framing this examination of the Rule are these: (1) Does Rule 4.2 apply to the conduct of lawyers in criminal as well as civil matters? (2) Does a represented "party," under the Rule, mean only a person who is a formally designated party to an adjudicative proceeding, contract or negotiation, or does it apply more broadly to any person who is represented by counsel with respect to the matter that is the subject of the communication? (3) In the context of criminal investigations, does the prohibition apply differently before arrest or the filing of formal charges than it does after those events? (4) Does the prohibition apply if the communicating lawyer does not have definite knowledge that the person with whom she wishes to communicate is represented in the matter to be discussed? (5) What is the scope of the subject

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1. This opinion was prompted in part by the dialogue between the American Bar Association and the United States Department of Justice in connection with the promulgation of the Department's regulations on Communications with Represented Persons, 28 C.F.R. Part 77.

2. This Committee has proposed an amendment to the Rule, to substitute "person" for "party" in the text of the Rule. That proposal will be submitted to the House of Delegates for consideration in August 1995. The change would resolve the ambiguity in the present Rule that is discussed in Part II of this Opinion. The Committee's proposal would also amend the Comment to the Rule to clarify certain matters regarding its proper scope as discussed in this Opinion in the text accompanying notes 36 and 38.

matter about which communication is prohibited? (6) May a lawyer representing a corporation or other organization bar communication with all employees of the organization by declaring a blanket representation of the organization and its employees? (7) May a lawyer communicate with a represented person absent consent of that person's lawyer if that person initiates the contact? (8) May a lawyer communicate with a person known to have been represented in the matter to be discussed who states that she has terminated or intends to terminate the representation? (9) To what extent does the prohibition on a lawyer's communicating with a represented person apply also to investigative agents acting under the direction of a lawyer? (10) What communications with represented persons fall within the "authorized by law" exception in Rule 4.2?

#### The Background and Purposes of the Anti-Contact Rule

While the debate about the scope and application of Rule 4.2's prohibition on contacts with represented parties has been heated, the controversy appears to be of relatively recent vintage. The ethical prohibition against such contacts has enjoyed a long history and broad acceptance. Its origin appears to be found in Hoffman's treatise, in 1836:

I will never enter into any conversation with my opponent's client, relative to his claim or defence, except with the consent, and in the presence of his counsel.<sup>3</sup>

Every ethical code promulgated by the American Bar Association has contained an anti-contact provision. Thus, the Canons of Professional Ethics, promulgated in 1908, included the following provision in Canon 9:

A lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel; much less should he undertake to negotiate or compromise the matter with him, but should deal only with his counsel.

Since that time, rules embodying this fundamental ethical precept, usually following one or another of the models offered by the ABA, have been adopted in every state.<sup>4</sup>

In DR 7-104(A)(1) of the ABA Model Code of Professional Responsibility, which superseded the 1908 Canons and in turn anteceded the Model Rules, the language closely resembles what is now found in Rule 4.2:

#### **Communicating With One of Adverse Interest.**

(A) During the course of his representation of a client a lawyer shall not:

3. 2 David Hoffman, *A Course of Legal Study Addressed to Students and the Profession Generally* 771 (2d ed. Baltimore 1836), quoted in John Leubsdorf, *Communicating with Another Lawyer's Client: the Lawyer's Veto and the Client's Interests*, 127 U. Pa. L. Rev. 683, 684 n.6 (1979).

4. See Roger C. Cramton & Lisa K. Udell, *State Ethics Rules and Federal Prosecutors: The Controversies Over the Anti-Contact and Subpoena Rules*, 53 U. Pitt. L. Rev. 291, 292 n.3 (1992).

- (1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in the matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.

In addition, EC 7-18 of the Model Code set out the central proposition on which all of the anti-contact rules have rested:

The legal system in its broadest sense functions best when persons in need of legal advice or assistance are represented by their own counsel.

Implementing this fundamental premise, the anti-contact rules provide protection of the represented person against overreaching by adverse counsel, safeguard the client-lawyer relationship from interference by adverse counsel, and reduce the likelihood that clients will disclose privileged or other information that might harm their interests.<sup>5</sup>

#### **I. THE BAR AGAINST COMMUNICATION WITH REPRESENTED PARTIES APPLIES TO CRIMINAL AS WELL AS CIVIL MATTERS**

Model Rule 4.2, like its predecessors, seeks to maintain a real barrier between the opposing lawyer and the represented person. In the context of a civil matter, the rule has been described as perhaps the sole barrier between the client and an overreaching opponent.<sup>6</sup> Similarly, the prohibition against communications with represented persons operates in a criminal matter to protect a represented person against harmful admissions and waivers of privilege that may result from interference with the client-lawyer relationship. Recognizing that communications in a criminal case may entail significant consequences for the represented person, the Department of Justice has noted that the reasons for an anti-contact rule apply to criminal proceedings, "perhaps with more force than in the civil context."<sup>7</sup>

Although there have been holdings to the contrary,<sup>8</sup> the Committee believes it is clear that Rule 4.2 applies to the conduct of lawyers in criminal as well as civil matters, including both federal and state prosecutors. It has been argued that, because the Rule applies to a lawyer only "[i]n representing a client," the Rule does not reach the conduct of a prosecutor since she does not represent a "client" in the ordinary sense.<sup>9</sup> However, the history of the

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5. Cramton & Udell, *supra* note 4 at 325.

6. *Id.* See also *Polycast Technology Corp. v. Uniroyal, Inc.*, 129 F.R.D. 621, 625 (S.D.N.Y. 1990) (stating that the anti-contact rule prevents lawyers from using superior skills and training to obtain "unwise statements" from an opposing party, protects privileged information, and aids in settlements by allowing lawyers skilled in negotiating to conduct discussions about the matter).

7. 4 Op. Off. Legal Counsel 576, 584 (1980) (concluding, however, that DR 7-104 did not prohibit federal criminal investigative activities because such activities are "authorized by law").

8. See, e.g., *State v. Richmond*, 560 P.2d 41, 46 (Ariz. 1976), cert. denied, 433 U.S. 915 (1977); *State v. Nicholson*, 463 P.2d 633, 636 (Wash. 1969).

9. See F. Dennis Saylor, IV & J. Douglas Wilson, Putting a Square Peg in a Round Hole: The Application of Model Rule 4.2 to Federal Prosecutors, 53 U. Pitt. L. Rev. 459 (1992).

Rule and its predecessors offers no support for any assertion that it was intended to exempt prosecutors. Moreover, a majority of court decisions have concluded that Rule 4.2 and its predecessor anti-contact rules apply to both federal and state prosecutors;<sup>10</sup> even though, as discussed in part III below, some decisions have also limited the Rule's application in the context of criminal investigations prior to arrest or indictment.

Defense counsel in criminal cases of course are also subject to the provisions of Rule 4.2. For example, suppose that co-Defendants Able and Baker are charged with a crime, and Lawyer representing Defendant Able wishes to communicate with Defendant Baker because she has reason to believe that he may be able to exculpate her client. If Lawyer knows that Defendant Baker is represented in that matter, she may not engage in any communications with Baker without the consent of Baker's lawyer.<sup>11</sup>

## **II. THE BAR APPLIES TO COMMUNICATIONS NOT ONLY WITH FORMAL "PARTIES" BUT ALSO WITH ANY PERSON KNOWN TO BE REPRESENTED WITH RESPECT TO THE MATTER TO BE DISCUSSED**

Although most frequently encountered in the context of litigation, Rule 4.2 applies (as have its predecessor anti-contact rules) in transactional circumstances as well. For example, suppose Buyer and Seller in a real estate transaction are each represented by counsel. The lawyer who represents Seller contacts Buyer, without leave of Buyer's lawyer, to suggest postponement of the closing. That communication would be prohibited under Rule 4.2 absent the consent of Buyer's lawyer. The same would of course apply to separately represented parties to negotiations leading to a closing, or to any other transaction or potential transaction.

Moreover, even in a litigation context, the application of the Rule does not depend on a proceeding having actually commenced, so that those involved in a dispute have become formal "parties." The Comment to Rule 4.2 makes

10. See generally, *United States v. Hammad*, 858 F.2d 834 (2d Cir. 1988), cert. denied, 498 U.S. 871 (1990); *United States v. Thomas*, 474 F.2d 110 (10th Cir.), cert. denied, 412 U.S. 932 (1973); *In re Doe*, 801 F. Supp. 478 (D.N.M. 1992); *United States v. Lopez*, 765 F. Supp. 1433 (N.D. Cal. 1991), rev'd on other grounds, 4 F.3d 1455 (9th Cir. 1993); *Suarez v. State*, 481 So.2d 1201 (Fla. 1985), cert. denied, 476 U.S. 1178 (1986); *People v. Green*, 274 N.W.2d 448 (Mich. 1979).

11. See *United States v. Santiago-Lugo*, Crim. No. 95-029 (D. P.R. June 6, 1995), 11 ABA Law. Man. Prof. Conduct 192 (criminal defense counsel who conducted ex parte interviews with co-defendants of their client censured for violating Rule 4.2); but cf. *Grievance Comm. for the Southern District of New York v. Simels*, 48 F.3d 640 (2d Cir. 1995) (holding that the lawyer for a criminal defendant was not barred from interviewing, without consent of his lawyer, a potential witness against his client in one matter, who was also a potential codefendant of his client in another matter, since in neither case was this individual a "party" in the same "matter" as the lawyer's client within the meaning of DR 7-104(A)).

plain that "the rule covers any person, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question."<sup>12</sup>

Much of the controversy regarding the scope of Rule 4.2 has turned on its use of the term "party." There is case law holding that in order for a person to be deemed a "party" under the Rule or its predecessors, at least in the criminal context, formal proceedings must have been initiated in which that person is named as a party.<sup>13</sup> A majority of the Committee believe, however, that the term "party," as used in Rule 4.2, should not be given so narrow a meaning. As pointed out above, the Comment to the Rule states that it applies to "any person, whether or not a party to a formal proceeding." And the word "party" has a broad as well as a narrow sense.<sup>14</sup>

The Committee recognizes that, as just indicated, the word "party" as used in the Rule is ambiguous -- an ambiguity compounded by the fact that the caption of the Rule refers to a "person" represented by counsel.<sup>15</sup> The key to resolving this ambiguity, the Committee believes, is consideration of the purposes intended to be served by the Rule. In this light, the broader sense of the word "party," taking it as equivalent to "person," is clearly the appropriate one.<sup>16</sup> The reasons for protecting uncounselled persons against overreaching

12. Rule 4.2 cmt. [3].

13. See *United States v. Ryans*, 903 F.2d 731, 739 (10th Cir.), cert. denied, 498 U.S. 855 (1990) ("We are not convinced that the language of [DR 7-104(A)(1)] calls for its application to the investigative phase of law enforcement" because "the rule appears to contemplate an adversarial relationship between litigants, whether in a criminal or a civil setting".) But see *United States v. Hammad*, 858 F.2d 834 (2d Cir. 1988), cert. denied, 498 U.S. 871 (1990) (DR 7-104(A)(1) applies prior to filing of formal charges).

14. Thus, the term "party" is commonly used to refer to persons beyond the technical parties involved in a matter. For example, "third party discovery" is frequently used with the same meaning as "non party discovery." Moreover, the definition of "party" appears in *Black's Law Dictionary* (6th ed. 1990) as "[a] person concerned or having or taking part in any affair, matter, transaction, or proceeding, considered individually."

See also Charles W. Wolfram, *Modern Legal Ethics* 611 (1986) (observing that "party" is a lawyerism that is intended to refer broadly to any "person" represented by a lawyer in a matter, and suggesting that while DR 7-104(A)(1) of the Model Code of Professional Responsibility "probably" prohibited contact with any represented person, Model Rule 4.2 clearly does); N.Y. State Bar Assoc. Comm. on Prof'l. Ethics, Op. 656 (1993) (interpreting N.Y. Disciplinary Rule 7-104(A)(1) as applying to communications between lawyer representing parent in child custody proceeding and child for whom a law guardian had been appointed even though the child is not a "party" to the proceeding); N.Y. State Bar Ass'n Comm. on Prof. Ethics Op. 463 (1977) (describing DR 7-104(A)(1) as an absolute proscription against communications with a represented person, not merely a technical party).

15. The comprehensive record of the deliberations of the Kutak Commission casts no light on the reason why the word "person" was used in the caption of the Rule while "party" was used in its text.

16. In order to eliminate the ambiguity arising from use of the term "party," described in the accompanying text, the Committee has proposed that the Rule be amended to substitute the word "person" for "party" in the body of the Rule. See note 2, *supra*.

by adverse counsel, protecting the client-lawyer relationship from interference by such counsel, and protecting clients from disclosing privileged information that might harm their interests, are not limited to circumstances where the represented person is a party to an adjudicative or other formal proceeding. The interests that the Rule seeks to protect are engaged when litigation is simply under consideration, even though it has not actually been instituted, and the persons who are potentially parties to the litigation have retained counsel with respect to the matter in dispute.<sup>17</sup>

The harms that may flow from the disparity in sophistication and skill between a lay person and a lawyer are as likely to occur prior to the initiation of formal proceedings as they are following the filing of papers. Indeed, the critical phase in the representation of a client may be precisely the period when a lawyer, using her professional skills and training, attempts to avoid the filing of a suit entirely or to shape prospective litigation. In such circumstances, a lawyer may, intentionally or otherwise, take advantage of unsophisticated persons who are represented by counsel and thereby circumvent the client-lawyer relationship. Rule 4.2 should, therefore, operate to prevent a lawyer from adversely affecting the relationship between a client and her lawyer even in the absence of a formal proceeding.<sup>18</sup>

If the Rule is to serve its intended purpose, it should have broad coverage, protecting not only parties to a negotiation and parties to formal adjudicative proceedings, but any person who has retained counsel in a matter and whose interests are potentially distinct from those of the client on whose behalf the communicating lawyer is acting. Such persons would include targets of criminal investigations,<sup>19</sup> potential parties to civil litigation,<sup>20</sup> and witnesses who

17. See, e.g., *United States v. Jamil*, 546 F. Supp. 646, 654 (E.D.N.Y. 1982), rev'd on other grounds, 707 F.2d 638 (2d Cir. 1983) (stating that DR 7-104(A)(1) protects a person who is a potential litigant); Florida State Bar Assoc. Comm. on Prof. Ethics, Op. 78-4 (1978) (stating that DR 7-104(A)(1) applies "whenever an attorney-client relationship has been established . . . regardless of whether or not litigation has commenced."); Mississippi State Bar, Op. 141 (1988) ("The actual filing of a lawsuit or intent to file a lawsuit is irrelevant to the question of whether the lawyer may communicate with the adverse party."); Texas State Bar Prof. Ethics Comm., Op. 492 (1994) (prohibitions of the Texas anti-contact rule, which is similar to Rule 4.2, apply "despite the fact that litigation is neither in progress nor contemplated.").

18. See Geoffrey C. Hazard, Jr. & W. William Hodes, *The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct* 730 (1993 Supp.). See, e.g., Comm. on Prof. Ethics and Conduct of the Iowa State Bar Assoc. v. Shepler, 519 N.W.2d 92 (Iowa 1994) (attorney's violation of DR 7-104(A)(1) resulted in disbarment when he obtained personal gain in a direct transaction with an elderly woman after being instructed to contact either her family or attorney regarding business matters).

19. See, e.g., *United States v. Jacobs*, 547 F.2d 772 (2d Cir. 1976), cert. dismissed as improvidently granted, 436 U.S. 31 (1978). But see the discussion in Part III *infra*, regarding decisional authority limiting the Rule's application in criminal investigations prior to arrest or the filing of formal charges.



have hired counsel in the matter.<sup>21</sup> In sum, the Rule's coverage should extend to any represented person who has an interest in the matter to be discussed, who is represented with respect to that interest, and who is sought to be communicated with by a lawyer representing another party.<sup>22</sup>

### III. THE BAR MAY HAVE MORE LIMITED APPLICATION TO CRIMINAL INVESTIGATIONS PRIOR TO ARREST OR THE FILING OF CRIMINAL CHARGES

As has been noted, the reasons for the prohibition on contacts with represented persons apply at least as forcefully in the criminal as in the civil context; and in both contexts they apply before formal proceedings have been initiated as well as afterward. Nonetheless, a number of court decisions, mainly involving the conduct of undercover investigators or informants acting in concert with prosecutors, have limited the applicability of the Rule or its predecessor anti-contact rules in the criminal context, either holding the prohibition wholly inapplicable to all pre-indictment non-custodial contacts,<sup>23</sup> or holding it inapplicable to some such contacts by informants or undercover agents.<sup>24</sup> Some cases note that the Rule would apply if the communication had been made by the prosecutor himself, or at his specific direction.<sup>25</sup> Some courts have specifi-

20. See, e.g., *Triple A Machine Shop, Inc. v. State*, 261 Cal. Rptr. 493, 498 (Ct. App. 1989)(California anti-contact rule's prohibitions "attached once an attorney knew that an opposing party was represented by counsel even where no formal action had been filed."). See also decisions cited in note 17, *supra*.

21. See, e.g., *United States v. Pinto*, 850 F.2d 927 (2d Cir.), cert. denied, 488 U.S. 867 (1988) (holding that DR 7-104 applied where the prosecutor interviewed a represented witness who was a potential defendant); ABA Formal Op. 187 (1938) (holding that the prohibition in Canon 9 covers a party in a civil case who also is a prospective witness in the matter).

22. In the Committee's view, the decision in the *Simels* case, *supra* note 11, took an unduly narrow view of the anti-contact rule there involved, DR 7-104, in declining to hold the rule applicable to contact with a represented adverse witness and potential co-defendant.

23. See *United States v. Ryans*, 903 F.2d 731, 740 (10th Cir.), cert. denied, 498 U.S. 855 (1990)(DR 7-104(A)(1) does not apply "during the investigation process before the initiation of criminal proceedings"); *United States v. Heinz*, 983 F.2d 609, 613 (5th Cir. 1993) (following *Ryans*).

24. See *United States v. Jamil*, 707 F.2d 638, 645-46 (2d Cir. 1983) (communication by undercover informant in pre-indictment non-custodial setting did not violate DR 7-104(A)(1) where informant was not acting as "alter ego" of prosecutor); *United States v. Lemonakis*, 485 F.2d 941, 954-56 (D.C. Cir. 1973) cert. denied, 415 U.S. 989 (1974) (DR 7-104 did not prohibit use of undercover informant in a pre-indictment, noncustodial circumstance because the informant's instructions from the prosecutor were not such as to make him the prosecutor's alter ego).

25. See *United States v. Hammad*, 858 F.2d 834, 838-40 (2d Cir. 1988), cert. denied, 498 U.S. 871 (1990) (DR 7-104(A)(1) applies prior to filing of formal charges, and undercover informant's use of sham subpoena, under specific direction of prosecutor, to trick suspect contributed to the informant's becoming the prosecutor's alter ego); *United States v. Jamil*, 546 F. Supp. 646, 654 (E.D.N.Y. 1982), rev'd on other grounds,

cally relied upon the Rule's use of the word "party" (as opposed to "person") to reach the conclusion that the Rule was not intended to apply to non-custodial pre-indictment communications with represented persons in the criminal context.<sup>26</sup> But at least one court has held that an anti-contact rule using the term "person" rather than "party" has no application to pre-indictment non-custodial investigations.<sup>27</sup> Some courts have appeared to take the view that since non-custodial pre-indictment communications with persons known to be represented would not violate the Sixth Amendment, such contacts should not be considered violative of anti-contact rules.<sup>28</sup> And some courts have expressed the view that applying a no-contact rule before indictment would unduly limit the government's ability to investigate suspected criminal activity.<sup>29</sup>

The Committee believes that to the extent those decisions suggest that the Rule has no application at all in the criminal context, or that it does not come into play until Sixth Amendment rights attach, they are not sound.<sup>30</sup> As one court has noted, since prosecutors have substantial control over the timing of an indictment, limiting the Rule to post-indictment communications could allow the government to "manipulate grand jury proceedings to avoid its encumbrances."<sup>31</sup> Moreover, applying the Rule to prohibit only post-indictment com-

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707 F.2d 638 (2d Cir. 1983) ("Any direct communication between the Assistant United States Attorney, or a representative of his office, and the defendant occurring after the government became aware that he was represented by counsel would constitute a violation of DR 7-104(A)(1)."); *People v. White*, 567 N.E.2d 1368, 1386-87 (Ill. App.) appeal denied, 575 N.E.2d 922 (Ill. 1991) (holding, following *Hammad*, that DR 7-104 applies prior to filing of formal charges, but is only violated by use of an informer in such circumstances when the attorney/prosecutor is "intimately involved in the investigation", so as to make the informer his alter ego). See also *United States v. Heinz*, 983 F.2d at 615 (Parker, J., concurring in part and dissenting in part) (prosecutor's use of lawyer as undercover informant violated DR 7-104 because he was able to act as a "prosecutorial alter ego" for the government).

26. See, e.g., *United States v. Ryans*, 903 F.2d at 739 ("We are not convinced that the language of [DR 7-104(A)(1)] calls for its application to the investigative phase of law enforcement" because the rule's use of the word "party" "appears to contemplate an adversarial relationship between litigants, whether in a criminal or a civil setting.").

27. See *In re Disciplinary Proceedings regarding John Doe*, 876 F. Supp. 265 (M.D. Fla. 1993) (Florida version of Model Rule 4.2 should be interpreted consistently with that Rule in other circuits, notwithstanding the fact that it uses the word "person" rather than "party").

28. See, e.g., *United States v. Dobbs*, 711 F.2d 84 (8th Cir. 1983); *United States v. Kenny*, 645 F.2d 1323 (9th Cir.), cert. denied, 452 U.S. 920 (1981); *United States v. Heinz*, 983 F.2d 609 (5th Cir. 1993).

29. See, e.g., *United States v. Ryans*, 903 F.2d at 739-40; *United States v. Jamil*, 707 F.2d at 745.

30. Accord ABA Informal Op. 1373 (1976) (finding that Canon 9 bars a prosecutor from sending a letter containing a plea offer to a represented person, even though the communication was pre-indictment).

31. *United States v. Hammad*, 858 F.2d at 839.

munications would render the rule of little use in the criminal context.<sup>32</sup>

The Committee also believes that, in criminal cases, Rule 4.2 is not simply coextensive with the Fifth and Sixth Amendments. While the Fifth and Sixth Amendments provide protections to individuals in the context of a criminal case, the Constitution establishes only the "minimal historic safeguards" that defendants must receive rather than the outer limits of those they may be afforded.<sup>33</sup> Ethics rules, on the other hand, seek to regulate the conduct of lawyers according to the standards of the profession quite apart from other laws or rules that may also govern a lawyer's actions. Consequently, by delineating a lawyer's duties to maintain standards of ethical conduct, ethical rules like Rule 4.2 may offer protections beyond those provided by the Constitution.<sup>34</sup>

The Committee recognizes that prohibitions against communications with a represented person can be an obstacle to investigation, but the search for truth is not the only value to which lawyers, including government lawyers, must respond. Indeed, the Sixth Amendment right to counsel puts limits on the government's investigatory efforts. The filing of an indictment, which triggers that constitutional right, may mean that the government can establish a *prima facie* case against the person charged, but more investigation is generally required ultimately to prove the person's guilt beyond a reasonable doubt. Thus, it could be argued that but for the attachment of the right to counsel, lawyers could arrange for undercover investigations

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32. See Alafair S.R. Burke, *Reconciling Professional Ethics and Prosecutorial Power: The Non-Contact Rule Debate*, 46 *Stan. L. Rev.* 1635, 1642-45 (1994).

It should be noted that the Department of Justice's regulations on Communications with Represented Persons recognize that in limited circumstances, an anti-contact prohibition applies pre-indictment. Specifically, although the regulations take a categorical position that no one is a "party" until there is a formal proceeding in which he is named as such, 28 C.F.R. § 77.3(a), they prohibit negotiation of a plea agreement, settlement, immunity agreement and other disposition of potential criminal charges with a represented person unless the communication was initiated by that person and the procedure referred to in the text, *infra* at note 51, has been followed, 28 C.F.R. § 77.8. In addition, the accompanying amendments to the United States Attorneys' Manual forbid *ex parte* contacts with represented "targets" of investigations in all but exceptional circumstances. U.S.A.M. 9-13.240 *Overt Communications with Represented Targets*. The manual defines a target as a person against whom the lawyer for the government "(a) has substantial evidence linking that person to the commission of a crime or to other wrongful conduct; and (b) anticipates seeking an indictment or naming as a defendant in a civil law enforcement proceeding."

33. *United States v. Hammad*, 858 F.2d at 839 (quoting *McNabb v. United States*, 318 U.S. 332, 340 (1943)).

34. *Id.* See also 4 Op. Off. Legal Counsel 576, 581 (1980) (stating that "DR 7-104, as generally interpreted, provides suspects and defendants with protections that the Constitution does not.").

involving contacts with the charged person. However, despite the resulting investigatory problems, the Sixth Amendment bars lawyers from "deliberately eliciting" information from a person who is represented unless her counsel is present or she expressly waives her right to counsel.<sup>35</sup> There are also statutory limitations on investigative techniques, which go beyond constitutional requirements.<sup>36</sup> And other ethical prohibitions indubitably restrict prosecutors' activities.<sup>37</sup> Similarly, Rule 4.2 imposes an additional burden on the opposing counsel to use investigatory means other than direct contact with a represented person.

All this said, the Committee recognizes that there is a body of decisional law that in effect concludes that the public interest in investigating crime may outweigh the interests served by the Rule in the criminal context, at least where the contacts are made with represented persons who have been neither arrested nor formally charged, and the contacts are made by undercover agents or informants and not by the government lawyers themselves (or by agents acting so closely under the lawyers' direction as to be their "alter egos"). Accordingly, the Committee believes that so long as this body of precedent remains good law, it is appropriate to treat contacts that are recognized as proper by such decisional authority as being "authorized by law" within the meaning of that exception stated in the Rule.<sup>38</sup>

**IV. THE BAR APPLIES ONLY IF THE COMMUNICATING LAWYER KNOWS THAT THE PERSON SOUGHT TO BE COMMUNICATED WITH IS REPRESENTED BY COUNSEL IN THE MATTER TO BE DISCUSSED; BUT SUCH KNOWLEDGE MAY BE INFERRED FROM THE CIRCUMSTANCES**

The Rule's requirement of securing permission of counsel is limited to those circumstances where the inquiring lawyer "knows" that the person to whom he wants to speak is represented by counsel with respect to the subject of the communication.<sup>39</sup>

35. See *Maine v. Moulton*, 474 U.S. 159 (1985); *Brewer v. Williams*, 430 U.S. 387 (1977); *Massiah v. United States*, 377 U.S. 201 (1964).

36. E.g., 18 U.S.C. § 2511 (prohibiting wiretapping without a warrant); 12 U.S.C. § 3402 (limiting governmental access to financial records of customers of financial institutions).

37. E.g., Model Rule 3.8 (Special Responsibilities of a Prosecutor); Model Rule 4.1(a) (Truthfulness in Statements to Others); Model Rule 4.3 (Dealing with Unrepresented Persons); Model Rule 4.4 (Respect for Rights of Third Persons).

38. The Committee's proposal for amendment of Rule 4.2, discussed in note 2, *supra*, includes a proposed amendment to Comment [2] to the Rule, to recognize as "authorized by law" governmental investigative activities prior to the commencement of criminal proceedings and in addition civil enforcement proceedings when they have been held permissible by such judicial authority.

39. The purposes of the Rule, which is to say the reasons for requiring consent of counsel representing the person with whom communication is sought, clearly apply whether or not the inquiring lawyer is aware of the representation. Thus, the requirement that that lawyer know of the representation serves not to implement the purposes

The term "knows" is defined in the Terminology section of the Model Rules as follows:

"Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from the circumstances.

"Know" does not mean "reasonably should know," which is also a defined term in the rules that does not appear in the text of Rule 4.2 although it does appear in Rule 4.3, "Dealing with Unrepresented Person" (which applies to the communication if the lawyer does not know that the person contacted is represented by counsel). [FN40] The Terminology provides that

"Should have known," when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

Thus, in the Committee's view, Rule 4.2 does not, like Rule 4.3, imply a duty to inquire. Nonetheless, it bears emphasis that, as stated in the definition of "knows" (set out above), actual knowledge may be inferred from the circumstances. It follows, therefore, that a lawyer may not avoid Rule 4.2's bar against communication with a represented person simply by closing her eyes to the obvious.<sup>41</sup>

#### **V. THE BAR IS LIMITED TO COMMUNICATIONS RELATED TO THE SUBJECT MATTER OF BOTH REPRESENTATIONS**

Rule 4.2 makes reference to the subject matter of two representations, and requires a link between them. Thus, it provides that "in representing a client," a lawyer shall not communicate "about the subject of the representation" -- referring to the lawyer's representation of her client. It goes on to refer to communications with one whom the lawyer knows to be "represented in the matter" -- requiring that the second representation be within the compass of

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of the Rule but only to frame a rule of conduct that can as a practical matter reasonably be imposed. It would not, from such a practical point of view, be reasonable to require a lawyer in all circumstances where the lawyer wishes to speak to a third person in the course of his representation of a client first to inquire whether the person is represented by counsel: among other things, such a routine inquiry would unnecessarily complicate perfectly routine fact-finding, and might well unnecessarily obstruct such fact-finding by conveying a suggestion that there was a need for counsel in circumstances where there was none, thus discouraging witnesses from talking.

40. Rule 4.3 provides:

##### **Dealing with Unrepresented Person**

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

41. The Committee's proposed amendment to Rule 4.2 to substitute "person" for "party," discussed in note 2, *supra*, would also amend the Comment to deal more clearly with the requirement that the communicating lawyer know of the representation.

the inquiring lawyer's representation. This required connection between the two representations, imparted by the phrase "in the matter," significantly limits the scope of the prohibition.

If a person is represented by counsel on a particular matter, that representation does not bar communications on other, unrelated matters. For example, suppose a lawyer represents Defendant on a charge involving crime A. Under Rule 4.2, another lawyer may not, pursuant to a representation, either as prosecutor or as counsel for a co-defendant involving crime A, communicate with Defendant about that crime without leave of Defendant's lawyer. However, if the communicating lawyer represents a client with respect to a separate and distinct crime B and wishes to contact Defendant regarding that crime, the representation by counsel in crime A does not bar communications about crime B. Similarly, the fact that Defendant had been indicted on crime A would not prevent the prosecutor from communicating with Defendant, directly or through investigative agents, regarding crime B.<sup>42</sup>

Questions regarding the scope of representation "in the matter" have arisen in the context of investigations of ongoing criminal enterprises. Can a lawyer representing persons believed to be involved in organized crime bar communications with her clients by advising the prosecutor that she represents these clients in all matters, without specification of what the matters are? Or may an individual insulate herself from undercover investigation in a criminal matter by retaining "house counsel?" The Committee believes that in both situations, and quite apart from the latitude that, as explained in part III above, the courts have allowed for undercover investigative contacts before arrest or indictment, the prosecutor is not barred from communicating under the Rule.

By prohibiting communication about the subject matter of the representation, the Rule contemplates that the matter is defined and specific, such that the communicating lawyer can be placed on notice of the subject of representation. Thus, if the representation is focused on a given matter, such as one involving past conduct, and the communicating lawyer is aware of this representation, she may not communicate with the represented person absent consent of the representing lawyer. However, where the representation is general -- such as where the client indicates that the lawyer will represent her in all matters -- the subject matter lacks sufficient specificity to trigger the operation of Rule 4.2.

Similarly, retaining counsel for "all" matters that might arise would not be sufficiently specific to bring the rule into play. In order for the prohibition to apply, the subject matter of the representation needs to have crystallized between the client and the lawyer. Therefore, a client or her lawyer cannot

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42. As a practical matter, in the course of contact with a person represented by counsel in another matter, the communicating lawyer would be well advised to take care not to elicit comments or attempt to communicate about crime A. However, Rule 4.2 does not preclude discussions of crime B.

simply claim blanket, inchoate representation for all future conduct whatever it may prove to be, and expect the prohibition on communications to apply. Indeed, in those circumstances, the communicating lawyer could engage in communications with the represented person without violating the rule.

In the civil context also, the "matter" with which the representation is concerned must have been concretely identified. For example, suppose that Corporation A wishes to purchase a subsidiary of Corporation B. Corporation B has an on-going relationship with outside counsel, law firm XYZ, such that the firm represents the corporation on all of its legal matters. In addition, Corporation A knows that XYZ law firm always represents Corporation B in its legal matters. However, Corporation A has not broached with Corporation B the possible purchase of Corporation B's subsidiary, and thus the general counsel for Corporation A has no reason to believe, let alone to know, that Corporation B has consulted its counsel regarding such an acquisition. In such circumstances, because the representation by outside counsel is not specifically focused on the matter, the general counsel for Corporation A is not barred by Rule 4.2 from contacting the president of Corporation B to initiate discussions without asking law firm XYZ for its consent. Correspondingly, the XYZ firm cannot preclude such a communication by announcing that it represents Corporation B for all purposes. A similar analysis applies as respects in-house general counsel, who represent the corporation for all purposes.<sup>43</sup>

#### **VI. REPRESENTATION OF AN ORGANIZATION DOES NOT BAR COMMUNICATIONS WITH ALL EMPLOYEES OF THE ORGANIZATION**

Questions arise as to the manner in which the Rule applies when the represented party is a collective entity, such as a corporation, rather than an individual. Specifically, the Committee has considered whether a lawyer's representation of an organization extends the Rule's prohibition, either automatically or upon the declaration of the organization's lawyer, to cover communications with all employees or members of that organization.

Some courts addressing this issue have found that the represented party is limited to corporate employees who fall within the "control group": those employees who manage and speak for the corporation.<sup>44</sup> The Comment to Rule 4.2, however, makes plain that the term represented party refers not only to those with managerial responsibilities but to anyone who may legally bind

43. As a practical matter, to be sure, a lawyer wishing to open a dialogue with a person or entity known to be generally represented by a particular firm or by in-house counsel may find it more expeditious and less likely to generate dispute to communicate through counsel.

44. See, e.g., *Wright ex rel. Wright v. Group Health Hosp.*, 691 P.2d 564 (Wash. 1984) (applying Model Code of Professional Responsibility DR 7-104(A)).

the organization with respect to the matter in question.<sup>45</sup> Consequently, when the party is an organization, the bar against communication covers not only the control group but in addition anyone "whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization."<sup>46</sup>

Expansive though the Rule's coverage is with respect to officers and employees of a represented organization, the Rule does not contemplate that a lawyer representing the entity can invoke the rule's prohibition to cover all employees of the entity, by asserting a blanket representation of all of them. So, for example, if in-house counsel for the XYZ corporation announces that no one may talk to any XYZ employee without obtaining in-house counsel's permission, the communicating lawyer is not barred from communicating with all employees. If an employee cannot by statement, act or omission bind the organization with respect to the particular matter, then that employee may ethically be contacted by opposing counsel without the consent of in-house counsel. Of course, if individual employees have their own counsel in the matter, then the bar against communication would apply absent consent of that separate counsel. But the fact that an entity is represented by counsel does not prevent communication with all current employees of the represented corporation.<sup>47</sup>

#### **VII. INITIATION OF THE CONTACT BY THE REPRESENTED PERSON DOES NOT REMOVE THE BAR**

Another issue arising under the Rule is whether the prohibition against communications with represented persons applies if the represented person

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45. Comment [2] provides:

In the case of an organization, this Rule prohibits communications by a lawyer for one party concerning the matter in representation with persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization. If an agent or employee of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. Compare Rule 3.4(f).

46. Accord, *Upjohn Co. v. United States*, 449 U.S. 383 (1981); *Chancellor v. Boeing Co.*, 678 F. Supp. 250, 253 (D. Kan. 1988); *Shearson Lehman Bros., Inc. v. Wasatch Bank*, 139 F.R.D. 412 (D. Utah 1991); *Morrison v. Brandeis University*, 125 F.R.D. 14, 16-17 (D. Mass. 1989); *Niesig v. Team I*, 76 N.Y.2d 363 (1990). See ABA Informal Op. 1410 (1978) (stating that DR7-104(A)(1) bars communication with an officer or employee of a corporation in a particular situation unless the communicating lawyer has the prior consent of the lawyer representing the corporation).

47. It should be noted that Rule 4.2 does not prohibit contacts with former officers or employees of a represented corporation, even if they were in one of the categories with which communication was prohibited while they were employed. This Committee so concluded in ABA Formal Op. 91-359 (1991).



initiates contact with the communicating lawyer. Rule 4.2 exempts communications if the lawyer representing the contacted person consents; but the Rule says nothing about permitting the represented person to forego the protection accorded him by the ethical responsibilities of the communicating lawyer. This Committee concluded in Formal Opinion 108 (1934) that the anti-contact rule does not contemplate such a waiver.

Since then, a number of courts have similarly found that because the ethical prohibition is designed, in part, to protect the effectiveness of the lawyer's representation, the represented person may not waive it.<sup>48</sup>

While the Committee recognizes that not allowing the represented person to waive the Rule's protection may be seen as paternalistic, it believes that Rule 4.2 requires that result. Reflecting the concern that the represented person may not be in a position to make an informed waiver of the presence of counsel, the Rule operates to reduce the likelihood of the represented person engaging in communications that might ultimately prove harmful to her cause by imposing a strict ethical obligation on the communicating lawyer.<sup>49</sup>

**VIII. WHEN CONTACT IS INITIATED BY A PERSON WHO IS KNOWN TO HAVE BEEN REPRESENTED BY COUNSEL IN THE MATTER BUT WHO DECLARES THAT THE REPRESENTATION HAS BEEN OR WILL BE TERMINATED, THE COMMUNICATING LAWYER SHOULD NOT PROCEED WITHOUT REASONABLE ASSURANCE THAT THE REPRESENTATION HAS IN FACT BEEN TERMINATED**

Of course, any represented person retains the right to terminate the representation. In the event that such a termination has occurred, the communicating lawyer is free to communicate with, and to respond to communications from, the former represented person. The communicating lawyer's conduct would then be governed by Rule 4.3, Communications with Unrepresented Persons.<sup>50</sup>

As a practical matter, a sensible course for the communicating lawyer would generally be to confirm whether in fact the representing lawyer has been effectively discharged. For example, the lawyer might ask the person to provide evidence that the lawyer has been dismissed. The communicating

FN48. See, e.g., *United States v. Lopez*, 4 F.3d 1455, 1459 (9th Cir. 1993) ("the trust necessary for a successful attorney-client relationship is eviscerated when the client is lured into clandestine meetings with the lawyer for the opposition. As a result, uncurbed communications with represented parties could have deleterious effects well beyond the context of the individual case...."); *People v. Green*, 274 N.W. 2d 448, 453 (Mich. 1991) (defendant's willingness to speak does "not excuse compliance with the standard of professional conduct prescribed by DR 7-104(A)(1)"); *United States v. Thomas*, 474 F.2d 110, 111 (10th Cir.), cert. denied, 412 U.S. 932 (1973); *United States v. Batchelor*, 484 F. Supp. 812 (E.D. Pa. 1980); *State v. Morgan*, 646 P.2d 1064, 1068-70 (Kan. 1982); *State v. Ford*, 793 P.2d 397, 401 n.4 (Utah App. 1990).

49. See *Lopez*, 4 F.3d at 1462 (finding that "[t]he rule against communicating with represented parties is fundamentally concerned with the duties of attorneys, not with the rights of parties.").

50. See note 40, *supra*.

lawyer can also contact the representing lawyer directly to determine whether she has been informed of the discharge. The communicating lawyer may also choose to inform the person that she does not wish to communicate further until he gets another lawyer.

There are some circumstances where the communicating lawyer may need to go beyond determining that the person has discharged her lawyer. One is that in a criminal case where the Court has appointed a lawyer to represent the client, the lawyer is not relieved as counsel of record until the court grants her leave to withdraw. Consequently, even if the contacted person tells the communicating lawyer that she has fired her lawyer, the communicating lawyer may not proceed without reasonable assurance that the court has granted the lawyer leave to withdraw. Similarly, if retained counsel has entered an appearance in a matter, whether civil or criminal, and remains counsel of record, with corresponding responsibilities, the communicating lawyer may not communicate with the person until the lawyer has withdrawn her appearance. In addition, if a communicating lawyer knows that the represented person is incompetent, that person's statement regarding the status of her representation may not be sufficiently reliable to allow the communicating lawyer to assume that she is free to engage in communications with the person.

On the other hand, there may be situations, particularly in the criminal context, in which the represented person is reluctant to terminate her relationship with counsel, or wishes to negotiate with the prosecutor without the knowledge of her counsel, because of doubt as to whether the lawyer representing her is in fact concerned with protecting her interests as distinct from protecting the interests of others who may have arranged for her representation. Even in such circumstances, the prohibition of Rule 4.2 against communications with the represented party applies, at least until the lawyer seeking to communicate with that person has assurance that the representation that the person is seeking to disclaim has been either terminated or superseded by a new representation. A useful course of action in such circumstances may be to request a court (if there is one with jurisdiction) to hold an ex parte hearing to appoint new counsel or give approval to the communication without counsel.<sup>51</sup> While arranging for such a hearing, the communicating lawyer should refrain from offering advice or engaging in other substantive discussions with the person in question until the court has acted.<sup>52</sup>

#### **IX. A LAWYER IS ETHICALLY RESPONSIBLE FOR CONTACTS BY INVESTIGATORS ACTING UNDER HER INSTRUCTIONS THAT WOULD VIOLATE THE BAR IF MADE BY A LAWYER**

The next issue the Committee has undertaken to address concerns the applicability of Rule 4.2 to the activities of investigators working with

51. The Department of Justice regulations on Communications with Represented Persons contemplate such a procedure. 28 C.F.R. § 77.6(c).

52. Accord, Mich. State Bar Comm. on Prof. and Jud'l. Ethics, Op. 202 (April 5, 1965).

lawyers; and in particular, the circumstances where a lawyer may be held vicariously responsible if an investigator collaborating with her communicates with a represented person without the consent of the representing lawyer.

There is no doubt that the use of investigators in civil and criminal matters is normal and proper. Particularly in the criminal context, there are legitimate reasons not only for the use of undercover agents to conduct investigations, but for lawyers to supervise the acts of those agents.<sup>53</sup> And the investigators themselves are not directly subject to Rule 4.2, even if they happen to be admitted to the Bar (as many FBI agents are), because they are not, in their investigative activities, acting as lawyers: they are not "representing a client."<sup>54</sup> However, when the investigators are directed by lawyers, the lawyers may have ethical responsibility for the investigators' conduct.

Such responsibility will ordinarily arise under Rule 5.3, which provides in part:

Responsibilities Regarding Nonlawyer Assistants

With respect to a nonlawyer employed or retained by or associated with a lawyer:

\* \* \*

- (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and
- (c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:
  - (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
  - (2) the lawyer is a partner in the law firm in which the person is

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53. Lawyer supervision of the activities of investigators is likely to make their work product more useful, and to provide assurance against the commission of improprieties by the investigators.

54. Although there appears to be no decisional authority on the point, it seems clear, and widely understood, that the fact that an investigator is also a member of the bar does not render him, in his activities as an investigator, subject to those ethical rules -- the overwhelming majority of the provisions of the Model Rules -- that apply only to a lawyer "representing a client." Such an investigator would nonetheless be subject to those few provisions of the Model Rules, such as portions of Rule 8.4 (Misconduct) that apply to lawyers even when they are not acting as such. See, e.g., Rule 8.4(b): "It is professional misconduct for a lawyer to . . . commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects."

Thus, the Department of Justice regulations on Communications with Represented Persons exclude from the defined term "attorney for the government" (with whose activities the regulations are principally concerned), "any attorney employed by the Department of Justice as an investigator or other law enforcement agent who is not authorized to represent the United States in criminal or civil law enforcement litigation or to supervise such proceedings." 28 C.F.R. § 77.2(a).

employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Under these provisions, if the lawyer has direct supervisory authority over the investigator, then in the context of contacts with represented persons, the lawyer would be ethically responsible for such contacts made by the investigator if she had not made reasonable efforts to prevent them (Rule 5.3(b)); if she instructed the investigator to make them (Rule 5.3(c)(1)); or if, specifically knowing that the investigator planned to make such contacts she failed to instruct the investigator not to do so (Rule 5.3(c)(2)).

The Committee believes, however, that if, despite instruction to the contrary, an investigator under her direct supervisory authority (or one not under such authority) made such contacts, she would not be prohibited by Rule 5.3 from making use of the result of the contact.<sup>55</sup> Rule 8.4(a) imposes similar, albeit narrower, ethical limits on what a lawyer can direct an investigator to do. Rule 8.4(a) provides:

**Misconduct**

It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another.

Since a lawyer is barred under Rule 4.2 from communicating with a represented party about the subject matter of the representation, she may not circumvent the Rule by sending an investigator to do on her behalf that which she is herself forbidden to do.<sup>56</sup> Whether in a civil or a criminal matter, if the investigator acts as the lawyer's "alter-ego," the lawyer is ethically responsible for the investigator's conduct.

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55. Although the question is a close one, the Committee does not believe that a lawyer's making use of evidence offered by an investigative agent by means that would have been forbidden to the lawyer herself but in which she was not complicitous would constitute "ratification" under Rule 5.3(c)(1).

"Ratify" is defined by Black's Law Dictionary (6th ed. 1990) as:

To approve and sanction; to make valid; to confirm; to give sanction to. To authorize or otherwise approve, retroactively, an agreement or conduct either expressly or by implication.

56. See ABA Informal Op. 663 (finding that Canon 9 prohibits employment of investigator in defense of malpractice suit to communicate with plaintiff who was represented by counsel); ABA Formal Op. 95 (1933) (finding that it is improper under Canon 9 for a municipal lawyer to permit police officers to obtain written statements from persons having personal injury claims against the municipality when the lawyer knows that the claimants are represented by counsel). See, e.g., *Shantz v. Eyman*, 418 F.2d 11, 13 (9th Cir. 1969); cert. denied, 397 U.S. 1021 (1970) (finding that a prosecutor acted unethically by sending a psychiatrist to speak with a represented defendant without counsel's knowledge).

## **X. THERE ARE SEVERAL CATEGORIES OF COMMUNICATIONS THAT ARE "AUTHORIZED BY LAW"**

The final issue the Committee has undertaken to address is the scope of the exception in Rule 4.2 permitting otherwise prohibited communications if they are "authorized by law." That exception first appeared in the black letter text of DR 7-104(A)(1), but had been found to be implied in Canon 9,<sup>57</sup> and is now to be found in the anti-contact rule of every jurisdiction but one.<sup>58</sup>

The Comment to Rule 4.2 identifies, as an example of a communication authorized by law, "the right of a party to a controversy with a government agency to speak with government officials about the matter" -- the right in question being First Amendment right of petition.<sup>59</sup> The "authorized by law" exception to the Rule is also satisfied by a constitutional provision, statute or court rule, having the force and effect of law, that expressly allows a particular communication to occur in the absence of counsel -- such as court rules providing for service of process on a party,<sup>60</sup> or a statute authorizing a government agency to inspect certain regulated premises.<sup>61</sup> Further, in appropriate circumstances, a court order could provide the necessary authorization.<sup>62</sup>

As has been explained in part III above, an additional category of circumstances that appear to be fairly treated as "authorized by law" are those where courts have held that certain criminal investigative activities prior to arrest or the filing of formal charges, such as the use of undercover agents or informers not acting as the prosecutor's "alter ego," are not prohibited by the Rule.

A more difficult issue is raised by the Department of Justice regulations on Communications with Represented Persons,<sup>63</sup> which are evidently intended to rest squarely on the "authorized by law" exception in Rule 4.2. That issue is what, if any, directives by a governmental department or agency purporting to permit contacts with represented parties fall within the "authorized by law" exception? The Committee believes that such directives will qualify as "law" for purposes of the Rule only when embodied in formal regulations that have been properly promulgated pursuant to statutory authority that contemplates

57. See ABA Informal Op. 985 (1967) (opining that a formal offer of judgment could, consistently with Canon 9, be served directly upon a represented opposing party, but only if this was specifically authorized by statute, and if a copy was simultaneously served on counsel).

58. The single exception is Florida. See Florida Rules of Prof. Conduct, Rule 4-4.2. See also *In re Disciplinary Proceedings regarding John Doe*, 876 F. Supp. 265 (M.D. Fla. 1993), discussed in note 27 *supra*.

59. Rule 4.2 cmt. [2]. See also Wolfram, *supra* note 14, at 614-15.

60. See Hazard & Hodes, *supra* note 18, at § 4.2.109 (1994 Supp.)

61. See ABA Informal Op. 1496 (1983) (an agency lawyer may conduct an inspection of regulated business premises without first contacting the lawyer for the business).

62. See *United States v. Lopez*, 989 F.2d 1032, 1099 amended, 4 F.2d 1455 (9th Cir. 1993) (noting that a court order, if it is to authorize an exception to the Rule's prohibition, must be based upon accurate, and not misleading, information).

63. 28 C.F.R. Part 77.

regulation of the character in question. Were any other regulation or fiat by an agency head to be considered an authorization by law, any government agency could "authorize" its lawyers to engage in conduct expressly prohibited by ethical codes simply by promulgating a regulation or policy.<sup>64</sup>

The Committee's view finds support in *Chrysler v. Brown*, 441 U.S. 281, 198 (1979), where the Supreme Court rejected the view that any agency conduct that has been directed or approved by an agency head is "authorized by law," within the meaning of a statute prohibiting such conduct except where "authorized by law." Rather, the Court held that for a government agency's regulation to have the force and effect of law, it must be a substantive regulation, which has been adopted in accordance with the procedural requirements imposed by Congress, and also rooted in a Congressional grant of authority. *Chrysler v. Brown* teaches that when an agency promulgates regulations purporting to authorize conduct in derogation of other law, those regulations must be grounded in a statute which contemplates regulations of the kind issued. A general grant of regulatory authority to an agency is not sufficient to support the issuance of regulations that permit what other law forbids. Although in *Chrysler v. Brown* the federal agency regulations in issue would have overridden requirements of a federal statute, the Committee believes the same result should be reached if the other law involved were rules of professional conduct adopted by state courts -- or, for that matter, federal courts.<sup>65</sup>

### CONCURRENCE

This is an important opinion addressing critical issues arising under Model Rule 4.2 and putting to rest a series of misguided notions that have been asserted by those who seek to undermine the sanctity of the lawyer-client relationship embodied in the provisions of Model Rule 4.2. There is nothing more central to what it means to be a client in the American system of justice than to know that, having hired a lawyer, the client need not worry about being taken advantage of by lawyers, with special skills and training, who represent others. Once the client's representation is disclosed, all lawyers are on notice that they must deal with the client's lawyer on all matters, unless the represented person's lawyer provides otherwise. Whether the matter is civil,

64. As has been noted above, ethical rules prohibiting communications with represented persons have been adopted in every state as a part of comprehensive ethics regulations. Lawyers representing the federal government are governed by these rules as a result of the specific requirement by Congress that federal attorneys be "duly licensed and authorized to practice as an attorney under the laws of a State, territory, or the District of Columbia." Department of Justice Appropriation Authorization Act, Fiscal Year 1980, Pub. L. No. 96-132, § 3(a), 93 Stat. 1044, as carried forward in Pub. L. No. 103-317, § 102, 108 Stat. 1734 (1994).

65. Although the Committee believes, as stated, that the *Chrysler v. Brown* test is an appropriate one for interpreting the term "authorized by law" in Rule 4.2, we express no view as to whether the Department of Justice regulations have sufficient statutory authorization to meet that test.

criminal or transactional, whether a complaint has been filed, an indictment brought, a tax audit commenced or an agreement of sale signed, whether an adverse party, a co-defendant or plaintiff, a witness or a participant in a transaction, all clients who have hired lawyers should benefit from the protection of Rule 4.2. Nor may a lawyer avoid the rule by using non-lawyer agents to undertake what the lawyer is prohibited from doing, by maintaining studied ignorance of the representation, or by claiming the represented person initiated the contract.

This concurrence is filed to address several points on which the author believes the majority opinion and the dissents do not have it quite right. First, the Committee observes in the headnote that "the Rule has been interpreted by some courts not to prohibit contacts by investigative agents acting under the general direction of a lawyer with a person known to be represented . . ." While this statement is correct, it doesn't explain to the unsuspecting, who might only read the syllabus, that almost all of those cases rely on reasoning which this opinion rejects, reasoning which this Committee, in issuing this Opinion describing what it believes to be the correct interpretation of the Rule, hopes courts in the future will also reject.

For too long, the mere repetition of the words "legitimate needs of prosecutors" has been used by the opponents of the principles of Model Rule 4.2 to undermine the protections the Rule is intended to provide. In responding to this litany, some of these courts, quite incorrectly, have eviscerated the Rule in the very situations where it is most needed: to protect from improper contacts those represented persons who face the awesome power of the government. Once a person has retained a lawyer in a matter, as this Opinion so carefully reasons, then all contacts are to be through that lawyer, and any contacts that are made on any basis other than through the lawyer, are in violation of the Rule.

Second, the majority opinion addresses by indirection the Department of Justice regulations on Communications with Represented Persons, regulations which by their terms are premised on so-called principles that are rejected out-of-hand in this opinion. More important, those regulations are clearly not authorized by law. There is no Congressional grant of authority to the Justice Department to issue regulations undermining the fundamental rights of clients to be represented by counsel. Moreover, regulation of lawyers, including Justice Department lawyers, has been traditionally and quite properly left to the states. Indeed, in the author's view, there could never be a delegation to the Justice Department or other law enforcement agency to set its own ethics rules unilaterally. When the drafters of Model Rule 4.2 inserted the words "authorized by law" they must have had in mind law established by either the courts or the legislature.

The Department of Justice regulations demonstrate the evil of having one party to disputed matters have that power. The regulations provide for loopholes so large that in some contexts they render the protections of Model Rule

4.2 meaningless. To ever permit a litigant (particularly one as powerful and capable of threatening represented parties as the Justice Department) to decide what rules will govern its own lawyers unbalances the judicial process in a fundamental, unfortunate and inequitable way.

Third, addressing Mr. Elliot's dissent, its flawed interpretation of Model Rule 4.2 as limited to "parties," not "persons," becomes apparent if one analyzes one of his opinion's examples. In trying to explain how, on the basis of principle, he is able to decide who is a party (and therefore entitled to the protection of the rule) and who is a person (and therefore not), Mr. Elliot explains that "[i]n a real estate transaction, the buyer and seller would be 'parties,' and, if represented, could not be contacted by the other's attorney absent consent of their own attorney. The buyer's mortgagee bank and the seller's bank whose mortgage the buyer would have to pay off would not be 'parties,' even if represented." This result will come as a great surprise to those in our profession who represent lenders, underwriters and other key "players" in transactions; in those situations, when it is made known that the bank or investment company will be represented by counsel, there should be every expectation, based on Model Rule 4.2, that lawyers for the buyer and seller would not be contacting the bank or investment company directly. If Mr. Elliot thinks otherwise, then that is but one more reason to conclude that Model Rule 4.2 was intended to reach these "persons" as well as the buyer and seller "parties." The buyer, the seller, the bank, the title company, the investment banker, the auditor and any other represented persons to a transaction, by the sole fact they choose to be represented by counsel, are entitled to the full protection of Model Rule 4.2, whether they meet Mr. Elliot's strained interpretation of party or not.

Finally, addressing Mr. Amster's dissent, while I share his view that the protections of Model Rule 4.2 are even more important in the criminal context, this does not mean that those protections should not be available to all clients, including organizations. The Rule recognizes, quite properly it seems, that the lawyer who represents an organization should not be able to prevent unsupervised contacts with all organization employees. By the same token, it recognizes that in order for an organization's lawyer to provide effective representation, contacts with employees having managerial responsibility, and any person whose act or omission in connection with the matter may be imputed to the organization or whose statement may constitute an omission must be prohibited. Any other rule would make it impossible for organization clients to receive the same level and quality of representation accorded to individuals. This may, as Mr. Amster notes, interfere with informal fact gathering but the need to resort to formal fact gathering is a very small price to pay for the important protections Model Rule 4.2 provides.

Lawrence J. Fox

Kim Taylor-Thompson

## **DISSENTS**



I cannot go along with this opinion. It is overbroad and obstructs the legitimate search for the facts and the truth in civil litigation. In concentrating upon the applicability of Rule 4.2 in the criminal context where the constraint upon communication with represented persons is based upon the constitution and concern for the rights of criminal defendants which might be overwhelmed by the resources of law enforcement agencies, this committee has overlooked its impact upon the pursuit of the truth and facts in civil litigation. The opinion provides counsel for organizations with even broader power to isolate potential adverse witnesses than presently exists under Rule 4.2. [FN66] By erecting this wall blocking the fact-seeker from persons who may have knowledge of the matter in both criminal and civil litigation, the committee has thrown out the baby with the bath water. This opinion in the civil context protects lawyers and their clients rather than individuals who might shed light on the factual basis of civil litigation.

Some members of the majority have asserted that the above-cited comment to Rule 4.2 fixed the direction of this opinion and that this dissent should have been directed at the rule rather than the opinion. If that is so, somewhere in this opinion the committee should have suggested modifications to the rule which would have made it less onerous to a fact-seeker in civil litigation, especially one with limited resources. Not only did they not do so, but they compounded the problem by opining that even if the contact is initiated by a low-level employee of a represented organization, the rule bars any contact. This means that in the run-of-the-mill civil case, where a lawyer announces that he represents the organization in all personal injury matters, it will be more time-consuming and expensive to marshal facts from persons who in many cases will be best situated to witness the event which resulted in the litigation, i.e., low-level employees of a represented organization who may be willing to tell what they know about the incident.

During the committee's lengthy discussions, a paragraph was suggested which would exempt communication initiated by a whistle-blower for the purpose of disclosing wrongdoing on the part of a corporation. Such a provision to this writer made common sense, but a majority of the committee voted to delete the paragraph. The opinion also fails to take into account the endless variety of factual situations where a noncontrol employee far down on the food chain might provide relevant information in civil litigation and makes it almost impossible to develop the facts without the oversight of lawyers thus making the search for the truth an obstacle course.

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66. Comment to Rule 4.2 provides that in the case of a represented organization, communications are prohibited with "persons having managerial responsibility on behalf of the organization and with any other person whose act or omission in connection with this matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization."

In addition to my substantive concern about this opinion, its length and complexity requires some comment. Several members of this committee tried their hand at writing an opinion upon which a majority of the committee might agree, and it is fair to say that the opinion ultimately took on a life of its own. The end result is a protracted and global interpretation of Rule 4.2 which is so convoluted and complex that it provides little comfort for the lawyer seeking facts to support his client's case as to precisely what conduct is permissible.

I envisage that the role of this committee is to furnish all members of the legal profession with guidelines which if followed would aid the ordinary practicing lawyer to comply with those ethical standards embodied in the Model Rules. This opinion is more appropriate for a learned legal periodical and does not take into account the real world where individual lawyers are confronted with time constraints in making hard decisions in the field of ethics. It just does not show them the way; to the contrary, it will add to their confusion.

The committee might have been better off had it abandoned its efforts and not written this opinion once the problems which gave rise to our interminable discussions and revisions surfaced. Unfortunately, it did not do so, and we are now issuing this massive work product which, in this writer's opinion, creates more problems for the average practicing attorney than it solves.

In light of the foregoing, I dissent.

Richard L. Amster

\* \* \*

The fundamental premise of much, if not most, of the Committee's opinion is the proposition that when Rule 4.2 uses the word "party", it really means "any person". The distinguished American writer, thinker and philosopher, Johnny Carson, was wont to observe: "You buy the premise, you buy the joke." I do not buy the premise. Accordingly, I dissent.

My dissent, however, is limited to the premise. I have no quarrel with the reasoning of the Committee on those points that do not require its latitudinarian interpretation of the word "party". Indeed, if I were to accede to that definitional view, I would have no quarrel with the elaboration of those points that do depend upon that premise. My dissent is simply based upon the fact that despite best efforts at textual archeology, the Committee can find no basis whatsoever in legislative history for its conclusion; the conclusion it reaches violates basic and universally-applied canons of statutory construction that govern the interpretation of these Rules; other jurisdictions have, by their actions on the Rules of Professional Conduct, recognized that "party" does not mean "any person"; and the conclusion itself is reduced in the end to a desperate exercise in wish fulfillment. The Model Rules, for better or worse, are not and never have been a wishing well.

### **Legislative History**

The Committee concedes, as it must, that it hasn't a clue as to why Rule 4.2 uses the word "party" instead of "person" when describing the protected com-

municatee. It recognizes that Canon 9 of the 1908 Canons of Professional Ethics used the word "party", and did so in a context clearly disclosing that the "party" was one with whom a dispute or transaction was involved. That same word "party" was repeated in DR 7-104(A)(1) under the title "Communicating With One of Adverse Interest". The word "party" again was employed in Model Rule 4.2, this time under the title "Communicating With Person Represented by Counsel". The Committee can find no discussion in the legislative history as to the meaning of "party" in any of these iterations of the rule.

### **Canons Of Constructions**

In light of the fact that throughout the Model Rules the word "person" is frequently used, but the word "party" is used in Rule 4.2, canons of statutory construction, universally applied as well in construing court rules like the Model Rules of Professional Conduct, compel the conclusion that "party" means something different from "person".

There is a presumption of purpose behind every sentence, clause or phrase of a rule, and no word in a rule is to be treated as superfluous. *DeSisto College, Inc. v. Town of Howey-in-the-Hills*, 706 F. Supp. 1479, 1495 (M.D. Fla. 1989), affirmed 888 F.2d 766; *Fox-Knapp, Inc. v. Employees Mutual Casualty Co.*, 725 F. Supp. 706, 709 (S.D.N.Y. 1989), affirmed 893 F.2d 14; *Peck v. Jacquemin*, 196 Conn. 53, 64, 491 A.2d 1043 (1985). The use of different words in the same Rules must indicate a difference in legislative intent. *BFP Resolution Trust Corp.*, 114 S. Ct. 1757, 1761 (1994); *Lankford v. Law Enforcement Assistance Administration*, 620 F.2d 35, 36 (4 Cir.; 1980); *Tafoya v. U.S. Dept. of Justice, LEAA*, 748 F.2d 1389, 1392 (10 Cir.; 1984). *Fritz v. Madow*, 179 Conn. 269, 272, 426 A.2d 268 (1979); *Hinchcliffe v. American Motors Corporation*, 184 Conn. 607, 613, 440 A.2d 810 (1981); *Farricielli v. Personnel Appeal Board*, 186 Conn. 198, 203, 440 A.2d 286 (1982).

We are not permitted to "torture words to import ambiguity where the ordinary meaning leaves no room for it." *Mingachos v. CBS, Inc.*, 196 Conn. 91, 98, 481 A.2d 368 (1985). A rule does not become ambiguous solely because people disagree as to its meaning. As much as we may think a rule should have meant something else, its intent is to be found not in what its enactors meant to say, but in the meaning of what they did say. We are not permitted to read into the terms of a rule something which manifestly is not there in order to reach what we think would be a just result. *In re Pederson*, 875 F.2d 781, 784 (9 Cir. 1989). *Commissioner v. Freedom of Information Commission*, 204 Conn. 609, 620, 529 A.2d 692 (1987). Neither does a rule become ambiguous simply because different courts might have interpreted it differently. *Jones v. Brown*, 41 F.3d 634, 639 (Fed. Cir. 1994).

Fidelity to the canons of construction which govern courts in interpreting the Model Rules, and therefore ought to govern this Committee, compels the conclusion that this Committee cannot impose upon the word "party" the meaning of "any person".

As a simple matter of logic, the Committee cannot, by the ipse dixit of an

opinion, ignore the fact that for almost 90 years a different word -- "party" -- has been used in Rule 4.2 and its antecedents at the same time that the Committee's favored word -- "person" -- has been used elsewhere in the same Canons, Code and Rules by the same authors. To import synonymy where the drafters used different words is resolutely to close one's eyes to the obvious, and to flout the canons of construction that govern our deliberations.

### **What Other Jurisdictions Have Done**

That "party" does not mean "any person" is demonstrated as well by the understanding of the jurisdictions -- now, some 40 -- which have adopted the Model Rules or variants of them. Simply put, when these jurisdictions wanted Rule 4.2 to protect more than just parties, they amended Rule 4.2 to say so. Thus, Alaska Rule 4.2 ("party or person"); Texas Rule 4.2 ("person, organization or entity of government"); Florida Rule 4-4.2 ("person"); and see Oregon DR 7-104(A)(1) ("person"). This Committee itself has -- in what one presumes is not an act of supererogation -- proposed to the House of Delegates in August, 1995 changing the word "party" to "person" in Model Rule 4.2.

Presumably, the 40 or so jurisdictions that have adopted the Model Rules -- indeed those still operating under the Code of Professional Responsibility -- have long understood that "party" is a subset, and not a synonym, of "person". Those who wanted a more expansive protection have amended the rule. Amendment, not wish-fulfilling interpretation, is the way to pour the new wine of "person" into the old bottle of "party".

### **Unambiguous Meaning**

The Committee for some reason (probably because it wants an excuse to construe it so that it can then apply it as it does in the Opinion) and contrary to universally-applied canons of construction, *supra*, purports to find the word "party" ambiguous, and finds the ambiguity "compounded" by use of the word "person" in the title to the Rule. But that latter fact should not affect the meaning of "party" in the Rule. All parties are persons, but not all persons are parties. The overall title to the section comprising Model Rules 4.1 - 4.4 is "Transactions With Persons Other Than Clients."

The Committee chooses to treat "party" as meaning "person" despite the fact that the drafters knew full well how to employ the broader "person" when they meant "person" -- they used that word in Rules 4.1, 4.3 and 4.4 -- but avoided using it in Rule 4.2. The Committee, seeking to buttress the logic of interpreting "party" to mean "person", notes that the word "party" is used as a synonym for "person" in the phrase "third party discovery". In the Model Rules, however, when "third person" is meant, "third person" is the phrase the drafters use. See, e.g., Model Rules 4.1(a) and (b) and 4.4.

Seeking support for its expansive interpretation, the Committee cites part, but not all, of the Black's Law Dictionary definition of "party". A more instructive citation would have included the entire definition:

Party, n. A person concerned or having or taking part in any affair, matter, transaction, or proceeding, considered individually. A "party" to an action is

a person whose name is designated on record as plaintiff or defendant. *M & A Elec. Power Co-op v. True*, Mo. App., 480 S.W.2d, 310, 314. Term, in general, means one having right to control proceedings, to make defense, to adduce and cross-examine witnesses, and to appeal from judgment. *City of Chattanooga v. Swift*, 223 Tenn. 46, 442 S.W.2d 257, 258.

"Party" is a technical word having a precise meaning in legal parlance; it refers to those by or against whom a legal suit is brought, whether in law or in equity, the party plaintiff or defendant, whether composed of one or more individuals and whether natural or legal persons; all others who may be affected by the suit, indirectly or consequently, are persons interest by not parties. *Golatte v. Mathews*, D.C. Ala. 394 F. Supp. 1203, 1207.

See also Nominal defendant; Parties; Prevailing party.

Black's Law Dictionary (5th ed.)

When we accept the lexicographers' invitation to see related words and turn to "parties" we find a definition which, quite rightly, takes the word beyond the confines of litigation:

Parties. The persons who take part in the performance of any act, or who are directly interested in any affair, contract, or conveyance, or who are actively concerned in the prosecution and defense of any legal proceeding. *Green v. Bogue*, 158 U.S. 478, 15 S. Ct. 975, 39 L.Ed. 1061 See also Party.

Id.

Indeed, in light of the clearly limited meaning of "party" as a common law term, the Committee's diktat that "party" means "any person" contravenes yet another canon of statutory construction: that unless those promulgating a rule make manifest an intent to the contrary, a presumption obtains that when they use a common law term, they intend to use it in its common law sense. *United States v. Shabani*, 115 S.Ct. 382, 385 (1994); *Resolution Trust Corp. v. Diamond*, 45 F.3d 665, 672 (2 Cir. 1995); *Citizens Action League v. Kizer*, 887 F.2d 1003, 1006 (9 Cir. 1989), cert. den. *Department of Health Services of California v. Citizens Action League*, 110 S. Ct. 1524; *U.S. v. Patterson*, 882 F.2d 595, 603 (1 Cir. 1989), cert. den. 110 S. Ct. 737; and see *Gilbert v. United States*, 370 U.S. 650, 655 (1962).

The Committee's discussion is also unpersuasive because the Committee appears constantly to be shifting ground in identifying the concept against which it is fighting. Too often the Committee seeks to justify its "person" choice by arguing that for policy reasons the communicatee need not be a "party to an adjudicative or other formal proceeding." But the Comment already says that. The issue, with which the Committee never comes to grips, is whether by using the word "party" the drafters intended to mean a person who had an interest in the matter -- be it a lawsuit, a contract negotiation, a real estate closing, or whatever -- which it was the purpose and foreseeable outcome of the matter significantly and directly to affect. Such persons would have an interest qualitatively different from others in the matter, a qualitative difference signified by the word "party". The Committee neither acknowledges nor addresses this natural -- and in my view, correct -- rationale for the use consis-

tently since 1908 of the word "party" instead of the word "person". Such an interpretation, however, is exactly what "parties" *supra*, is defined as meaning.

In this scenario, for instance, a plaintiff and defendant in a lawsuit would be "parties", because the purpose and foreseeable outcome would directly affect their interests. The fact or expert witness would not be a "party", even if for whatever reason he had retained a lawyer to advise him in his capacity as a witness. In a matrimonial case, where custody, visitation rights or support are issues, the represented children of the marriage would be parties because of the centrality of their interests to the matter, even though they are not formal parties to the litigation.

In a real estate transaction, the buyer and seller would be "parties", and, if represented, could not be contacted by the other's attorney absent consent of their own attorney. The buyer's mortgagee bank and the seller's bank whose mortgage the buyer would have to pay off would not be "parties", even if represented; so that the buyer's lawyer could contact directly the seller's mortgage officer to find out the precise amount of the pay-off figure without the intermediation of the bank's lawyer. While both banks have an interest in the transaction, the interest is qualitatively ancillary to the central interest of the buyer and the seller.

As a policy matter, of course, it might conceivably be better if the word "person" were used in Rule 4.2 instead of "party". It certainly would be easier to apply the Rule (though the consequences of such a broad applicability have only begun to be discerned in the Committee's opinion). Indeed, the Committee has proposed changing the Rule to substitute "person" for "party"; and if that change is adopted, this discussion will be moot for the Model Rule, though still relevant in the vast majority of jurisdictions which have adopted Rule 4.2 using "party".

But ease of application and logical consistency cannot effect a change in the meaning of a word used consistently since 1908 in this particular rule, especially where, as here, there is a perfectly normal, natural meaning to be accorded to the word "party" that acknowledges its more limited ambit as a subset, instead of a synonym, of "person".

### **Conclusion**

If the Committee's expansive reading of "party" to mean "person" is correct, there is no need for the House of Delegates in August of 1995 to change the text of Model Rule 4.2, as proposed by the Committee. If the Committee's reading is correct, the Judges of Oregon, Alaska and Texas did not know what they were doing when they amended their rules, thinking they were expanding "party". If the Committee's reading is correct, the ABA House of Delegates stands accused of bizarre and irrational behavior for using the word "party" in Rule 4.2 to mean the same thing as that for which everywhere else it had used "person" (and so do the Houses that adopted the Model Code and the Canons).

Of course, this is not so. This Committee, in proposing the rule change, understood that it was proposing just that: a change in the rule. The Judges of

Alaska, Oregon and Texas did not engage in futile gestures of rule-making. The House of Delegates in adopting Model Rule 4.2 and deliberately using the word "party" where everywhere else it had used the word "person" clearly intended a difference in meaning.

If my colleagues want Model Rule 4.2 to protect "any person", their remedy is not to imagine ambiguity in the current term "party" and then through construction transform it into the broader term "person". Their remedy is to proselytize the members of the House to change the words as the Committee has proposed. Theirs must be the route of legislation, not interpretation.

Ralph G. Elliot